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## *United States V. Miggins: A Survey of Anticipatory Search Warrants and the Need for Uniformity Among the Circuits*

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# *United States v. Miggins*: A Survey of Anticipatory Search Warrants and the Need for Uniformity Among the Circuits

## INTRODUCTION

Federal appellate courts have addressed anticipatory search warrants since the late 1970s.<sup>1</sup> An anticipatory warrant differs from a traditional search warrant in that a court issues it before the contraband reaches the place to be searched and thus is “peculiar to property in transit.”<sup>2</sup> Its issuance requires a supporting affidavit alleging facts sufficient to provide a magistrate with probable cause to believe that the contraband will be at the place to be searched at the time of the search.<sup>3</sup>

Although the specific requirements vary by circuit, anticipatory search warrants generally involve authorities’ intercepting contraband<sup>4</sup> in transit, either through the mail or by automobile.<sup>5</sup> They then ask a magistrate judge to issue a search warrant based on probable cause that the contraband will reach its destination in a “controlled delivery,” and will be waiting at the place to be searched at the time of the search.<sup>6</sup> Usually, the authorization to execute the warrant will be conditioned upon the occurrence of a specific event, sometimes referred to as a “triggering event,” such as the delivery of the package containing the contraband and its introduction into the premises specified in the anticipatory search warrant.<sup>7</sup>

As the United States Supreme Court has yet to address the requirements for anticipatory warrants, requirements vary by circuit.<sup>8</sup> This

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1. *United States v. Lowe*, 575 F.2d 1193 (6th Cir. 1978). The first case, however, to address a warrant with anticipatory characteristics was *Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969).

2. *United States v. Leidner*, 99 F.3d 1423, 1425 (7th Cir. 1996).

3. *United States v. Ricciardelli*, 998 F.2d 8, 11 (1st Cir. 1998).

4. Usually, the contraband is narcotics (*see United States v. Becerra*, 97 F.3d 669, 670 (2d Cir. 1996)), or, in the case of child pornography, the government will mail the contraband itself as the result of undercover operations aimed at catching purveyors and consumers of child pornography (*see United States v. Loy*, 191 F.3d 360, 362 (3d Cir. 1999)).

5. *See United States v. Moetamedi*, 46 F.3d 225, 226 (2d Cir. 1995); *United States v. Vigneau*, 187 F.3d 70, 73 (1st Cir. 1999).

6. *See Leidner*, 99 F.3d at 1425.

7. *See United States v. Moetamedi*, 46 F.3d 225, 227 (2d Cir. 1995); *United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994).

8. *See David P. Mitchell, Recent Development: Anticipatory Search Warrants: The Supreme Court's Opportunity to Reexamine the Framework of the Fourth Amendment*, 44 VAND. L. REV. 1387, 1388-90 (1991) (examining the place of anticipatory search warrants within established Fourth Amendment jurisprudence and recognizing that the Supreme Court, as of 1991, had not

Comment will survey the requirements of each circuit and illustrate the similarities and differences among the circuits. In addition, it will examine the recent Sixth Circuit decision in *United States v. Miggins*<sup>9</sup> and discuss the manner in which *Miggins* misapplies precedent from its own jurisdiction.

As the Sixth Circuit has deviated from its own precedent in *Miggins*, this Comment will also demonstrate the manner in which the other circuits have likewise failed to follow any central precedent dealing with anticipatory warrants. Due to the inconsistency in and among the circuits, the possibility that the circuits will continue to depart from precedent, and the lack of motivation and power to adopt a uniform rule, there is a dire need for uniformity in this area of Fourth Amendment jurisprudence. The definitive authority in the interpretation of the Fourth Amendment, the United States Supreme Court, should unify the circuits' approach to anticipatory warrants.

#### UNITED STATES V. MIGGINS

*Miggins* arose from the Nashville police's controlled delivery of a Federal Express package from Los Angeles to the residence of defendant Charles Moore.<sup>10</sup> The package contained more than a kilogram of cocaine. The affidavit securing the warrant to search Moore's apartment stated, in part, that "[w]hen [the package containing the cocaine] is delivered to [Moore's residence] and possession of the package is taken by someone inside [Moore's residence], as is anticipated, then and only then will the search warrant be executed."<sup>11</sup>

One of Moore's three co-defendants signed for the package outside

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addressed the issue). See also James A. Adams, *Anticipatory Search Warrants: Constitutionality, Requirements, and Scope*, 79 KY. L.J. 681, 688 (1991) (recognizing that, as of 1991, the Supreme Court had yet to address the issue of anticipatory search warrants, examining Federal Rule of Criminal Procedure 41(a), and undertaking a detailed examination of the components of anticipatory search warrants, including the purposes of controlled deliveries, alternatives to controlled deliveries, and the general requirements for a valid anticipatory search warrant); Andrew M. Belt, *Comment: Anticipatory Search Warrants: State and Federal Applications and Their Future in Maryland*, 28 U. BALT. L. REV. 337, 341 (1999) (recognizing that the Supreme Court, as of 1999, had yet to address the issue of anticipatory search warrants). Belt, along with a thorough review of anticipatory search warrants in state courts, divided the federal courts into two categories: those that apply the "sure course" test as the measure of an anticipatory warrant's validity, and those that use "an alternative analysis," consisting of "independent evidence giving rise to probable cause that the contraband will be located at the premises at the time of the search" (citing *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir. 1989)). This paper will provide a survey of the cases dealing with anticipatory search warrants by federal circuit courts of appeals.

9. 302 F.3d 384 (6th Cir. 2002).

10. *Id.* at 387.

11. *Id.* at 394.

of Moore's residence.<sup>12</sup> All three immediately left and took the package with them without taking it into the house.<sup>13</sup> According to one officer who witnessed the controlled delivery, all three co-defendants present "went in and out of Moore's residence before [one co-defendant] signed for the package."<sup>14</sup> One of Moore's co-defendants, however, testified that none of them entered Moore's residence before anyone signed for the package.<sup>15</sup> Regardless of the means of delivery, the officers executed the search warrant.<sup>16</sup>

Moore moved to suppress evidence of a firearm seized at his home upon the execution of the search warrant.<sup>17</sup> The United States District Court for the Middle District of Tennessee denied the motion, finding that there was probable cause for issuance of the anticipatory warrant and that the "triggering event" for the warrant had occurred.<sup>18</sup> Moore was found guilty of the charge of being a felon in possession of a firearm.<sup>19</sup>

On appeal, Moore challenged the district court's denial of his motion to suppress,<sup>20</sup> arguing that the triggering event upon which execution of the warrant depended did not occur.<sup>21</sup> The Sixth Circuit Court of Appeals disagreed, stating that:

[T]he triggering event required the delivery and acceptance of the package by someone inside the residence. On its face, the affidavit does not require that the person receiving the package actually be inside the residence when the package is delivered or that the person receiving the package take it inside the residence and remain in doors.<sup>22</sup>

Miggins is not the first Sixth Circuit case to address anticipatory search warrants. As this Comment will demonstrate, however, it marks a departure from previous Sixth Circuit jurisprudence.

## A SURVEY OF FEDERAL CIRCUIT DECISIONS

### *Sixth Circuit Court of Appeals*

The Sixth Circuit first dealt with anticipatory search warrants in

12. *Id.* at 394-95.

13. *Id.* at 394.

14. *Id.* at 395.

15. *Id.*

16. *Id.* at 389.

17. *Id.*

18. *Id.* at 389-90 (the court further found that even if the triggering event did not occur, the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), applied).

19. *Id.* at 390.

20. *Id.* at 394.

21. *Id.*

22. *Id.*

*United States v. Lowe*.<sup>23</sup> As part of a "routine drug inspection of packages originating in Thailand, a known source of heroin," the Detroit Post Office opened a package addressed to someone in Detroit,<sup>24</sup> and found heroin.<sup>25</sup> The package was resealed and delivered to the defendant's home one day after a warrant was issued for the search and seizure of the heroin.<sup>26</sup>

The defendant argued that there was no basis for finding probable cause that the contraband was presently located at the defendant's house<sup>27</sup> since the search warrant was issued before the delivery. The court ruled that probable cause existed to support the warrant once the package was delivered in "due course by the Post Office."<sup>28</sup> The court further stated that "[c]ontraband does not have to be presently located at the place described in the warrant if there is probable cause to believe that it will be there when the search warrant is executed."<sup>29</sup> This was certainly the case here, as "responsible officials" advised the issuing magistrate that "certain controllable events will occur in the near future," *i.e.*, the controlled delivery of the heroin by the Detroit Post Office to the defendant's home.<sup>30</sup>

The next Sixth Circuit case to address anticipatory search warrants was not decided until 1991.<sup>31</sup> In *United States v. Rey*, a customs inspector found cocaine in an express mail package addressed to "Grace Richardson" of Nashville, Tennessee.<sup>32</sup> The inspector forwarded the package to the Nashville Post Office, which turned it over to the Drug Enforcement Administration (DEA).<sup>33</sup> The DEA obtained search warrants for the package and for the apartment to which it was addressed.<sup>34</sup> The warrant's stipulations allowed any adult at the address to sign for the package.<sup>35</sup>

When the DEA agent attempted the controlled delivery, the defendant answered the door and identified himself as Leroy Rey.<sup>36</sup> Rey

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23. 575 F.2d 1193 (6th Cir. 1978).

24. *Id.* at 1193. The court also held "that the package from Thailand could be opened and inspected by customs officials in Detroit rather than Los Angeles, the original port of entry for the package." *Id.* at 1194.

25. *Id.* at 1193.

26. *Id.*

27. *Id.* at 1194.

28. *Id.*

29. *Id.*

30. *Id.*

31. *United States v. Rey*, 923 F.2d 1217 (6th Cir. 1991).

32. *Id.* at 1218.

33. *Id.*

34. *Id.* The agents replaced all but two grams of the six kilograms of cocaine with sugar. *Id.*

35. *Id.*

36. *Id.* at 1219. The postal inspector asked for the package's addressee, "Mrs. Richardson."

signed for the box and took it into the apartment.<sup>37</sup> Shortly thereafter, Rey left the apartment and was arrested as he drove away.<sup>38</sup> Agents told Rey that they had a search warrant for the apartment to which they had delivered the package. Rey admitted he lived in the apartment and had signed for the package,<sup>39</sup> and that he let the agents in.<sup>40</sup> The agents found the package unopened “within a foot or two of the door,” and executed the search warrant.<sup>41</sup>

The defendant argued that probable cause for the anticipatory search warrant existed only for the seizure of the controlled delivery package and nothing else in the apartment.<sup>42</sup> This was so, the defendant argued, because the affiant had no knowledge of any of the defendant’s illegal activities and had no knowledge of any illegal activities taking place in the apartment prior to the controlled delivery.<sup>43</sup>

At the suppression hearing, however, the affiant testified that the mail carrier for the apartment had seen several of “these types of packages” delivered there before, so the court concluded that there were prior indications of illegal activity at the apartment.<sup>44</sup> Furthermore, the court cited three cases from other circuits in support of the proposition that a controlled delivery alone may support probable cause to search a residence for more than just the package subject to the controlled delivery.<sup>45</sup>

The defendant also argued that the search warrant was defective because the warrant itself did not specify that execution depended upon the controlled delivery.<sup>46</sup> In response, the court stated that “[a]lthough it may be preferable to make such a statement, the warrant’s silence on this point does not render it void.”<sup>47</sup> The affidavit did request authorization for a search “subsequent to the delivery of the package,” and thus “a reasonable inference can be made that the warrant authorized a search

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*Id.* at 1218. The defendant said, “Yes,” and the inspector “specified that he was looking for ‘Grace Richardson’ and that defendant ‘didn’t look like Grace’ . . . [but the] defendant stated that he would ‘take it’ and signed his name to the express mail label.” *Id.* at 1218-19.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1220.

43. *Id.*

44. *Id.* The affiant, a special agent for the DEA, also testified “that the apartment had been under surveillance and defendant . . . had been seen at the apartment on the day before the delivery.” *Id.*

45. *Id.* at 1220-21 (citing *United States v. Washington*, 852 F.2d 803 804-05 (4th Cir. 1988)); *United States v. Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978); *United States v. Malik*, 680 F.2d 1162, 1165 (7th Cir. 1982).

46. *Id.* at 1221.

47. *Id.* (citing *State v. Wine*, 787 S.W.2d 31 (Tenn. App. 1989)).

only after the controlled delivery has occurred. If the controlled delivery had not occurred, then the warrant would have been void."<sup>48</sup>

In *United States v. Lawson*,<sup>49</sup> a postal inspector intercepted a package addressed from Phoenix, Arizona, to "David Lawson" of Kent, Ohio. The package aroused the suspicion of a postal inspector because it originated from a known source area for narcotics, had a nonexistent return address, was heavily wrapped in tape, and smelled like coffee.<sup>50</sup> A drug-sniffing dog alerted the inspector to the presence of narcotics in the package,<sup>51</sup> and a subsequent search revealed six ounces of cocaine.<sup>52</sup> The inspector resealed the package and submitted an affidavit for an anticipatory search warrant.<sup>53</sup>

The affidavit "made it clear that execution of the warrant would take place only if the package was 'successfully delivered and taken inside the residence.'"<sup>54</sup> In addition to seeking authorization to recover the package itself, the affidavit also sought permission to seize numerous other items based on the inspector's "conclusions of what could fairly be expected to be found at the place to be searched based upon [facts of the initial package search] and upon [the inspector's] training and experience in narcotics investigations."<sup>55</sup> The controlled delivery took place, the defendant signed for the package, took it into his residence, and the warrant was executed.<sup>56</sup>

The defendant argued that the only link between himself and the alleged drug trafficking was his name as addressee on the package, which would be confirmed by his acceptance of the package.<sup>57</sup> The court rejected this argument, citing *Rey* for the proposition that "a warrant to search an address may be based solely on the fact that a package containing illegal substances is on a 'sure course' to its destination (as in the mail)."<sup>58</sup> The court also noted that, based on the amount of drugs (six ounces of cocaine) and the manner of packaging (to avoid detection), the magistrate could reasonably determine that "an experienced

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48. *Id.* (citing *State v. Wahl*, 450 N.W.2d 710 (N.D. 1990)).

49. 999 F.2d 985, 986 (6th Cir. 1993).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* The affidavit also "contained a description of the package (its contents), the description of how the cocaine was concealed in the package in an attempt to avoid detection, and the fact that the return address was phony." *Id.*

55. *Id.* Some other items to be seized included the controlled delivery package, mailing records, cocaine, "drug implements used in the sale and distribution of cocaine, triple beam scales, documents, records, cash, ledgers, and receipts related to cocaine transactions." *Id.*

56. *Id.*

57. *Id.* at 987.

58. *Id.* at 988.

trafficker in narcotics sent the package in question,” and that “it was very likely the address on the package was the one at which it was intended to arrive.”<sup>59</sup>

*United States v. Jackson*<sup>60</sup> concerned a package mailed from Nigeria to East Cleveland, Ohio. A British customs official found the package suspicious based on its origin — a source country for illegal drugs — and its weight, which the official found heavy for the content description of a picture frame.<sup>61</sup> Inspection of the package revealed eighty grams of heroin.<sup>62</sup> The contents were photographed, resealed, and shipped to the Cleveland DEA.<sup>63</sup>

Once the package arrived, the DEA submitted an affidavit for an anticipatory search warrant.<sup>64</sup> The affidavit stated that “[i]f the package is successfully delivered and taken inside the residence, a Federal search warrant will be executed shortly thereafter. The warrant will be executed if, and only if, the package is accepted and taken inside the subject premises.”<sup>65</sup>

Law enforcement officials made the controlled delivery, and one of the defendants signed for the package and took it into the house.<sup>66</sup> Minutes later, agents announced that they had a warrant and entered the home.<sup>67</sup> The agents saw the two defendants running out of the back of

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59. *Id.* The court provided a more detailed explanation, along with a discussion of *Rey* and the sure course requirement:

Although *Rey* may be read to stand for the proposition that a warrant to search an address may be based solely on the fact that a package containing illegal substances is on a “sure course” to its destination (as in the mail), we note that in *Rey* and the instant case there were additional facts in the magistrate’s consideration of the ‘totality of the circumstances.’ The magistrate judge was in a position to determine that one does not send six ounces of cocaine through the mail to a specific address on a whim. The magistrate judge also knew through the affidavit that the cocaine in the package was concealed in an attempt to avoid detection. This factor makes it less likely that the defendant was ‘set up’ by someone and more likely that the cocaine was intended to reach its destination undetected. All of the information contained in the affidavit could reasonably lead a person to conclude that an experienced trafficker in narcotics sent the package in question. Consequently, it was very likely the address on the package was the one at which it was intended to arrive.

*Id.*

60. 55 F.3d 1219 (6th Cir. 1995).

61. *Id.* at 1220-21.

62. *Id.* A field test indicated that the substance was heroin. *Id.* at 1221.

63. *Id.*

64. *Id.* Before the government applied for its anticipatory search warrant, the Cleveland DEA first reopened the package pursuant to a search warrant. *Id.* The DEA then removed most of the heroin and replaced it with “an equivalent amount of sham substance, adding to the sham substance a few grams of the original heroin.” *Id.*

65. *Id.*

66. *Id.*

67. *Id.*



the house.<sup>68</sup> When caught one defendant had the package in his possession and was climbing a fence, and the other was caught near the back door.<sup>69</sup> Agents then executed the search warrant.<sup>70</sup>

On appeal, the defendant caught with the package argued that the warrant was defective, as it did not “specifically require the package to remain in the . . . house after the delivery.”<sup>71</sup> The court rejected this argument, stating that the warrant “took effect not upon issuance but at a specified future time,” meaning that the search could be made only after the controlled delivery occurred.<sup>72</sup> Therefore, the search did not violate the Fourth Amendment just “because the suspects in the premises to be searched abscond with the package upon its delivery.”<sup>73</sup> Once the package was accepted and taken inside, probable cause existed to search the premises for the contraband as well as other evidence of drug trafficking.<sup>74</sup>

The defendant also argued that the warrant created the potential for abuse; it “vested executing agents with unfettered discretion because it authorized them to search the premises after the package was no longer present.”<sup>75</sup> The court disagreed, holding that the warrant did not go “stale” because the defendant left with the package.<sup>76</sup> The lapse of time between the package delivery and the execution of the warrant was “brief,”<sup>77</sup> and the affidavit required only that the package be delivered and taken into the home, not that it subsequently remain there.<sup>78</sup>

In *United States v. Bender*,<sup>79</sup> a postal inspector intercepted a package sent from Opa Locka, Florida, to a Tennessee address.<sup>80</sup> At that time (early 1996), postal inspectors had observed an increase in the transportation of narcotics from Florida to Nashville, Tennessee through the mail, and were thus looking for suspicious packages.<sup>81</sup> In addition to

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68. *Id.*

69. *Id.* at 1221-22.

70. *Id.* at 1222. Also seized from the home were items “indicative of drug trafficking . . . including 27 individual packets of marijuana, a large quantity of small plastic bags, a hollowed-out library book, a DHL shipping envelope, and a pager.” *Id.*

71. *Id.* at 1223.

72. *Id.*

73. *Id.* at 1224.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* The court also stated that agents “were not vested with undue discretion in the timing of [the warrant’s] execution” because “the warrant required that once the controlled delivery was made, the search was to take place ‘shortly thereafter.’” *Id.*

78. *Id.*

79. 265 F.3d 464 (6th Cir. 2001).

80. *Id.* at 467.

81. *Id.*

having a false name listed on the return address, a narcotics canine indicated the presence of controlled substances.<sup>82</sup> A search pursuant to a warrant revealed more than twenty-one grams of crack cocaine.<sup>83</sup> The package was resealed along with a transmitter, which would beep slowly as long as the package remained closed. Once opened, however, the transmitter would beep quickly, functioning as an alarm.<sup>84</sup> The postal inspector submitted an affidavit for a search warrant which was subsequently granted.<sup>85</sup>

Next, agents attempted a controlled delivery.<sup>86</sup> The defendant accepted delivery and took the package into her home.<sup>87</sup> Three minutes later, the transmitter indicated that the parcel had been opened.<sup>88</sup> Agents executed the warrant, and found her in a bedroom with the “opened parcel” beside her on the bed.<sup>89</sup>

The defendant argued for suppression of the seized evidence based on lack of probable cause to issue the warrant and improper execution of the warrant, because, the defendant claimed, they entered her home before she opened the package.<sup>90</sup> The court rejected both arguments. First, there was probable cause to issue the search warrant, as “[t]his case represent[ed] a typical controlled-delivery drug bust.”<sup>91</sup> In addition, neither the affidavit nor the warrant required that the package actually be opened prior to execution of the warrant.<sup>92</sup> The warrant merely required that the package be delivered and taken into the residence.<sup>93</sup>

*United States v. Ware*<sup>94</sup> is the first Sixth Circuit case decided in the wake of *Miggins*. In *Ware*, a narcotics dog at a Federal Express facility

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 468. The affidavit stated, in part, that the inspector wished to install a transmitter in the package. *Id.* at 470. The “triggering event” for authorization to search the home was acceptance of the package, signing of a delivery receipt, and taking the package into the residence. *Id.* Neither the affidavit nor the warrant required that the transmitter be activated in order to execute the warrant. *Id.*

86. *Id.* at 468.

87. *Id.*

88. *Id.*

89. *Id.* Agents also found receipts from money transfers, receipts from car rentals, “a mirror with white powder on it . . . small baggies, a vial containing white powder, marijuana, and razor blades . . . a small bag of cocaine . . . vials, strainers, measuring spoons, scoops, and multicolored baggies,” beakers “with traces of cocaine,” two loaded handguns, as well as other items. *Id.*

90. *Id.* at 469.

91. *Id.* at 470. The facts that led to this conclusion were “[t]he observed frequency of Express Mail drug deliveries between Florida and the Nashville area, the positive identification of a controlled substance by a drug detection dog, and the discovery of approximately 21.6 grams of cocaine base in the Express Mail package.” *Id.*

92. *Id.*

93. *Id.*

94. 338 F.3d 476 (6th Cir. 2003).

in Louisville, Kentucky alerted police to the possible presence of drugs in a package.<sup>95</sup> Police obtained two warrants, one to search the package, and one “to insert an electronic tracking device and to enter any structure to seize the package if the device indicated that the package had been opened.”<sup>96</sup> Inside the package, police found cocaine and then repackaged a portion of the cocaine along with the tracking device.<sup>97</sup>

A detective then applied for a search warrant for the package’s delivery address.<sup>98</sup> Although the warrant itself authorized an “immediate search,” the supporting affidavit stated, “a controlled delivery of this parcel will be attempted.”<sup>99</sup> In addition, the court stated, “[a]ll of the officers involved considered this to be an anticipatory warrant.”<sup>100</sup>

The police delivered the package, and the defendant took it into his apartment. He then left “carrying an opaque shopping bag, and the electronic monitor indicated to the police surveillance team that the package was moving.”<sup>101</sup> The defendant drove away with the bag before being arrested a short time later with the package containing the cocaine.<sup>102</sup> Based on the warrant’s authority, police took the defendant back to his apartment and searched it, where they found drug paraphernalia and a weapon.<sup>103</sup>

The court held that the warrant was valid as an anticipatory search warrant despite the “boilerplate on the form of the warrant application” indicating an authorization for an immediate search.<sup>104</sup> Quoting *Miggins*, the court stated, “[W]arrants and their supporting documents are to be read not hypertechnically, but in a commonsense fashion’ . . . an objectively reasonable officer would likely have concluded that the warrant legally authorized a search of the apartment only upon the controlled delivery of the package.”<sup>105</sup> The supporting affidavit stated that a controlled delivery would occur, and the officers searched the apartment only after the controlled delivery took place, and thus the warrant and search were valid.<sup>106</sup>

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95. *Id.* at 478.

96. *Id.*

97. *Id.*

98. *Id.* at 479.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* It is unclear from the opinion whether the defendant had opened the package.

103. *Id.*

104. *Id.* at 482.

105. *Id.*

106. *Id.* (“[i]ndeed, the police executed this warrant in accordance with their belief that it was anticipatory, waiting until after the controlled delivery to search [the defendant’s] apartment”).

*First Circuit Court of Appeals*

The initial First Circuit case addressing the question of anticipatory search warrants was *United States v. Ricciardelli*.<sup>107</sup> As part of a sting operation, the government sent the defendant a catalogue of videotapes containing child pornography.<sup>108</sup> The defendant ordered several videotapes, and the government told him that one tape was available and would be shipped immediately.<sup>109</sup> The government then obtained a search warrant authorizing investigators to seize any items concerning child pornography.<sup>110</sup> The warrant itself stated that it would “not be effective until after delivery by mail to and receipt by [the defendant] of the . . . package containing the videotape.”<sup>111</sup>

A controlled delivery was attempted the next day.<sup>112</sup> The postal employee tried to deliver the package, but the defendant was not there to sign for or accept the package.<sup>113</sup> The employee left a notice for the defendant to pick up the package from the post office.<sup>114</sup> The defendant picked it up later that day and returned home.<sup>115</sup> Half an hour later, authorities executed the warrant.<sup>116</sup> They seized the videotape sent by the authorities, along with several others not listed in the warrant.<sup>117</sup>

The defendant initially argued that anticipatory search warrants were *per se* unconstitutional.<sup>118</sup> The court, however, noted that several other circuits had already held that anticipatory search warrants are not *per se* unconstitutional.<sup>119</sup> The court also stated that, despite the fact

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107. 998 F.2d 8 (1st Cir. 1993).

108. *Id.* at 9. Houston police originally discovered the defendant’s name on a list of suspected recipients of child pornography during a 1975 investigation. *Id.* Police gave postal inspectors the list in 1988. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 10. This was the “standard practice” of the post office. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* The court also stated:

[Anticipatory search] warrants must, of course, be issued under proper circumstances, upon a proper showing, and with proper safeguards. We hold, therefore, that when law enforcement personnel offer a magistrate reliable, independent evidence indicating that a delivery of contraband will very likely occur at a particular place, and when the magistrate conditions the warrant’s execution for the search of that place on that delivery, the warrant, if not overbroad or otherwise defective, passes constitutional muster. That the contraband has not yet reached the premises to be searched at the time the warrant issues is not, in constitutional terms, an insuperable obstacle.

*Id.* at 11.

that the issuing magistrate knows when the warrant is issued that the contraband is not presently located at the place to be searched, "the magistrate must simply widen his horizons to take into account the likelihood that the triggering event will occur on schedule and as predicted" and that the contraband will be found at the place to be searched at the time of the search.<sup>120</sup>

This warrant, however, failed to create an appropriate link between the videotape and the defendant's home.<sup>121</sup> Magistrates issuing anticipatory search warrants must draw conditions for their execution that are "explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents."<sup>122</sup>

In particular, the executing agents' discretion must be limited in two ways. First, "the magistrate must ensure that the triggering event is both ascertainable and preordained."<sup>123</sup> Second, "the contraband must be on a sure and irreversible course to its destination, and a future search of the destination must be made expressly contingent upon the contraband's arrival there."<sup>124</sup> Implicit in the "sure and irreversible course" standard is recognition that "the event on which the warrant is conditioned bears a definite relationship to the premises to be searched."<sup>125</sup> The court referred to this as a "tri-cornered nexus between the criminal act, the evidence to be seized, and the place to be searched."<sup>126</sup>

In this case, no nexus existed between the triggering event (the defendant picking up the package) and the place to be searched (the defendant's home).<sup>127</sup> By the warrant's terms, the defendant could have

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120. *Id.* at 10-11.

121. *Id.* at 12.

122. *Id.* (citing *United States v. Garcia*, 882 F.2d 699, 703-04 (2d Cir. 1989)).

123. *Id.* ("[t]he warrant should restrict the officers' discretion in detecting the occurrence of the event to almost ministerial proportions, similar to a search party's discretion in locating the place to be searched").

124. *Id.*

125. *Id.* at 13.

126. *Id.*

127. *Id.* The court also wrote:

Here, the warrant authorized a search not of appellant's person but of his home, for evidence relating to his dealings with child pornography distributors. The search was to be triggered by delivery of the videotape. Thus, the very premise on which the warrant rested was that the videotape's arrival would signal the existence of probable cause to believe that evidence of a crime — the videotape itself — as well as evidence of criminal predisposition or other nefarious activity was likely located in the dwelling. The warrant's text, however, completely ignored this connection, conditioning the search not on the arrival of the videotape at the place to be searched, but, rather, on appellant's personal receipt of the videotape, wherever he might be and wherever he might take his prize. By the terms of the warrant, once appellant retrieved the package at the post office, the postal inspectors could have searched his abode whether or not appellant brought the contraband there. An

picked up the videotape and taken it anywhere other than his home, yet the authorities could have searched his home regardless of whether the defendant actually took the package home.<sup>128</sup> It is true that the defendant did take the videotape home, but that did not help the warrant, as it did not establish the “tri-cornered nexus” between the criminal act, the evidence to be seized, and the place to be searched.<sup>129</sup>

In a later opinion by then Chief Judge Breyer, *United States v. Gendron*<sup>130</sup> somewhat limited *Ricciardelli*'s holding. In *Gendron*, the defendant ordered and received a videotape containing child pornography from a government sting operation.<sup>131</sup> Prior to delivery, government agents applied for and received a search warrant authorizing a search of the defendant's home for the tape “‘after delivery by mail to and receipt by [the defendant]’ of a specifically described parcel (containing the tape).”<sup>132</sup> Based on *Ricciardelli*, the defendant argued that the warrant was invalid, as it failed to specify the exact time when it would take effect.<sup>133</sup> He argued that the search warrant's reference to “delivery by mail to and receipt by [the defendant]” did not clearly enough describe the triggering event because it could be interpreted to mean “receipt” anywhere, as was the case in *Ricciardelli*.<sup>134</sup>

The court disagreed, and distinguished *Ricciardelli*. Here, the complete “context” of the warrant included the house. Moreover, the warrant made it clear that the object of the search was a video, and it mentioned delivery to the defendant's house.<sup>135</sup> The court stated that “commonsense suggest[ed] that the words ‘receipt by [the defendant]’ also refer[red] to receipt at [the defendant's] house, and not to receipt downtown or at the Post Office.”<sup>136</sup>

The most recent First Circuit case to address the topic was *United States v. Vigneau*.<sup>137</sup> There, the defendant and his co-conspirators regularly traveled from Rhode Island to Texas where they would buy marijuana and steroids and ship them back to Rhode Island for sale.<sup>138</sup> For large shipments, the defendants purchased two vans in El Paso,

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anticipatory search warrant that cedes such great discretion to the executing agents cannot withstand constitutional scrutiny.

*Id.*

128. *Id.*

129. *Id.*

130. 18 F.3d 955 (1st Cir. 1994).

131. *Id.* at 957.

132. *Id.* at 965.

133. *Id.* The warrant did not expire until ten days after issuance. *Id.*

134. *Id.*

135. *Id.* at 966-67.

136. *Id.*

137. 187 F.3d 70 (1st Cir. 1999).

138. *Id.* at 72.

Texas.<sup>139</sup>

In September of 1995, “the DEA intercepted an Airborne Express package with several pounds of marijuana and some steroids” mailed to the defendant’s wife’s address.<sup>140</sup> DEA agents sought a warrant based on the intercepted package, stating that the “package has been resealed and will be delivered by an undercover police officer posing as an Airborne Express deliveryman. Execution of this search warrant will not take place until approximately (10) to (15) minutes after delivery has been made.”<sup>141</sup>

The magistrate issued a warrant and agents attempted delivery.<sup>142</sup> When they arrived, however, they found a note on the door that said, “Leave package here — be back in 15 min . . . .”<sup>143</sup> Instead, the agents kept watch for the next three hours.<sup>144</sup> They “then left the package at the door, waited a brief period, and then entered and searched the house.”<sup>145</sup>

The court held that simply “leaving the package at the door did nothing to establish probable cause to search the premises — it was not received by anyone inside the premises — so any concern about whether the condition was satisfied or adequately set forth in the warrant is beside the point.”<sup>146</sup> Based on the facts of the case, however, probable cause existed to search the premises without the triggering event occurring.<sup>147</sup>

139. *Id.* at 73. They would sometimes use “U-Haul trucks filled with cheap furniture and concealed the marijuana, which was shrink-wrapped in plastic, behind the furniture.” *Id.*

140. *Id.*

141. *Id.* at 79. The warrant permitted a search of defendant’s wife’s apartment and a van. *Id.* The defendant and his wife were “legally separated,” but the address where the defendant’s wife lived was one “with which [the defendant] was otherwise connected.” *Id.* at 73. Apparently, this meant that the defendant resided there as well. *See id.* at 80 (the affidavit in support of the warrant referred to the defendant as “one of the residents” at the address to be searched).

142. *Id.* at 79.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 80.

147. *Id.* Those facts were, as set forth in the affidavit:

[A] Warwick, Rhode Island, police detective was familiar with one of the residents at [the address to be searched], [the defendant]; that he was known to traffic in narcotics and was also known to use his vehicle to transport narcotics; that electricity service at the house was in the name of [the defendant’s wife] and there was no ‘David Weiber’ [the person to whom the package was addressed] . . . that the van parked outside was registered to [the defendant], who had also been seen entering and exiting the . . . apartment; and that another package (contents unidentified) addressed to [the defendant and his wife] at [the address to be searched] was being shipped there from Texas via Federal Express.

*Id.*

*Second Circuit Court of Appeals*

In *United States v. Garcia*,<sup>148</sup> the Second Circuit Court of Appeals addressed for the first time the constitutionality of anticipatory search warrants. In that case, informants at Miami International Airport were found with cocaine.<sup>149</sup> The informants agreed to cooperate with DEA agents and take some of the cocaine to the defendant in New York City as part of a controlled delivery.<sup>150</sup> Based on these facts, agents applied for and received an anticipatory search warrant “contingent upon the delivery of cocaine by [informants].”<sup>151</sup>

On the day of the controlled delivery, informants knocked on the apartment door and were given permission to enter.<sup>152</sup> They sat down and placed the cocaine-filled duffel bags next to them on the floor.<sup>153</sup> Several minutes later, without anyone having taken possession of the duffel bags from the informants, DEA agents executed the search warrant.<sup>154</sup>

The defendant argued for suppression on the basis that there was no probable cause to believe that the cocaine was going to be in the defendant’s apartment at the time the warrant was issued.<sup>155</sup> The defendant also argued that the condition governing the warrant’s execution had not occurred at the time of the search, as she had not actually taken delivery when the search occurred.<sup>156</sup>

The court first rejected the probable cause argument.<sup>157</sup> The important consideration was that there is “‘probable cause to believe that it will be there when the search warrant is executed.’”<sup>158</sup> Anticipatory search warrants may withstand constitutional challenges where the contraband “is on a sure course to its destination.”<sup>159</sup> Once this determina-

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148. 882 F.2d 699 (2d Cir. 1989).

149. *Id.* at 700-01. The informants here were couriers, servicemen in the U.S. military stationed in Panama, used by defendants (one of the couriers was also a defendant) to smuggle cocaine to New York. *Id.* On this particular job, defendants carried a combined thirty-three kilograms of cocaine. *Id.* In Miami, “[c]ustoms officials noticed that the two servicemen appeared nervous, and after recognizing [one courier’s] name from a ‘customs alert list,’ searched both couriers and discovered the cocaine.” *Id.*

150. *Id.* at 701.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 702 (“when a government official presents independent evidence indicating that delivery of contraband will, or is likely to, occur, and when the magistrate conditions the warrant on that delivery, there is sufficient probable cause to uphold the warrant”).

158. *Id.* (quoting *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978)).

159. *Id.* (quoting *United States v. Domhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988)).



tion is made by a magistrate, the magistrate should list the warrant conditions governing the execution of the warrant “which are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents,” in order to protect against “premature execution.”<sup>160</sup>

In regard to the defendant’s second argument, the court stated that the warrant did not require that the defendant or anyone else take possession of the cocaine, or that the informants give up possession of the cocaine.<sup>161</sup> Instead, “the warrant listed an address that could be searched by government agents as soon as the cocaine was delivered there.”<sup>162</sup>

In *United States v. Moetamedi*,<sup>163</sup> the court addressed an issue left open by *Garcia* — “whether the conditions for execution of an anticipatory search warrant must be stated in the warrant itself, or may be stated only in the [supporting] affidavit.”<sup>164</sup> In *Moetamedi*, customs officials at Kennedy Airport inspected the contents of a package addressed to a New York location.<sup>165</sup> Inside, a customs official found a fifteen-inch brass plate that separated into two pieces, within which agents found approximately 775 grams of opium.<sup>166</sup> The defendant’s name was nowhere on the package, and officials mistakenly believed that “Data Post,” the name above the mailing address, was the addressee.<sup>167</sup> The government learned, however, that the defendant lived at the mailing address on the package<sup>168</sup> and submitted an affidavit in application for a search warrant.<sup>169</sup>

The affidavit for the warrant “expressly conditioned the search upon [the defendant’s] acceptance of the Package as an agent for Data Post.”<sup>170</sup> The warrant itself, however, did not express any condition for execution, and stated that “probable cause had been established” to believe that the contraband was already there.<sup>171</sup>

On the day of the warrant’s execution, the defendant accepted the

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160. *Id.* at 703-04.

161. *Id.* at 704.

162. *Id.*

163. 46 F.3d 225 (2d Cir. 1995).

164. *Id.* at 226.

165. *Id.*

166. *Id.*

167. *Id.* “Data Post” was the name of the international express mail company that shipped the package. *Id.*

168. *Id.* at 227. A background check revealed no prior criminal history on the defendant or his home. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

package as an agent for Data Post, signed his name, and took the package inside.<sup>172</sup> Agents executed the warrant and recovered the package as well as more cocaine and a pipe with marijuana residue.<sup>173</sup>

The court held that, despite *Garcia's* language that "when an anticipatory warrant is used, the magistrate should protect against its premature execution by listing *in the warrant* the conditions governing the execution which are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents,"<sup>174</sup> the warrant here was valid, as those conditions were contained in the affidavit of the warrant application.<sup>175</sup> In addition, the conditions listed in the affidavit actually had to have been satisfied before the warrant was executed, which occurred in this case.<sup>176</sup>

*United States v. Becerra*<sup>177</sup> dealt with a package taken off of the premises after a controlled delivery had been made. There, customs agents intercepted a package mailed from Colombia to New York, containing cocaine and addressed to the defendant.<sup>178</sup> Agents posing as Federal Express employees called the defendant, who said she would be at her home to pick up the package the next day.<sup>179</sup> On this basis, the government applied for and was issued "an anticipatory warrant that, by its terms, would be triggered by the delivery of the parcel."<sup>180</sup>

Agents then delivered the parcel and the defendant signed for it and took it into her residence.<sup>181</sup> A few minutes later, a co-defendant left the apartment with the parcel.<sup>182</sup> Agents nonetheless executed the search warrant, seizing evidence of drug trafficking.<sup>183</sup>

The defendant argued that the warrant become invalid once the package was taken off the premises.<sup>184</sup> The court rejected this argument:

[T]he warrant (1) explicitly stated that it would be triggered by the delivery of the parcel, and (2) was in no way conditioned on the continued presence of the package. Moreover, common sense dictates that a suspect should not be able to evade the effects of a warrant

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172. *Id.*

173. *Id.*

174. *Id.* at 229 (quoting *United States v. Garcia*, 882 F.2d 699, 703-04 (2d Cir. 1989)).

175. *Id.* at 229.

176. *Id.*

177. 97 F.3d 669 (2d Cir. 1996).

178. *Id.* at 670.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 671.

simply by getting rid of the supposed contraband or its container.<sup>185</sup>

The package was delivered and the triggering event occurred, thus the warrant was properly executed.

### *Third Circuit Court of Appeals*

So far, the Third Circuit has decided only one case involving the use of anticipatory search warrants. In *United States v. Loy*,<sup>186</sup> the U.S. Postal Inspection Service and the Pennsylvania State Attorney General's Office conducted an undercover child pornography investigation. An agent of the Attorney General's Office placed an ad in a sexually explicit magazine to which the defendant responded, stating that "he and his wife had a 'good collection' of child pornography and he expressed an interest in trading tapes" with the agent who placed the ad.<sup>187</sup> An agent called the defendant to discuss a possible trade, and "gave detailed descriptions of some of the tapes in his collection and told the agent that he could 'put together' tapes for trading."<sup>188</sup> The defendant also said that he wished to receive pornographic material from the agent "involving girls ranging from eight to thirteen years of age. He specifically requested that [the agent] send him a tape of girls between the ages of eight and ten in a bathtub ('Bath Time video'), which the agent agreed to do."<sup>189</sup>

The defendant sent another letter to the agent requesting the video.<sup>190</sup> The defendant listed a post office box as his return address.<sup>191</sup> On this basis, the agent prepared the video for delivery to the defendant's post office box and "submitted an affidavit and application for an anticipatory search warrant" of the defendant's home.<sup>192</sup> The video was then delivered to the defendant's post office box, and the agent observed him accept its delivery.<sup>193</sup> Other agents continued to watch the defendant and observed him take the tape with him as he returned home and entered his residence.<sup>194</sup> The agent then executed the search warrant.<sup>195</sup>

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185. *Id.*

186. 191 F.3d 360 (3d Cir. 1999).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The affidavit conditioned the search on the defendant's acceptance of the video "and returning to his residence with the tape in his possession."

193. *Id.*

194. *Id.*

195. *Id.* Agents recovered, apart from the video which was the subject of the warrant, another tape of child pornography, fifteen "computer disks" with child pornography, fifty other videotapes, "several pornographic magazines," and "various letters describing [the defendant's] solicitation of child pornography and his offers to trade such materials."

“As an initial matter,” the court held, “anticipatory warrants which meet the probable cause requirement and specifically identify the triggering event are not per se unconstitutional.”<sup>196</sup> To satisfy the probable cause requirement, the anticipatory warrant must state a “sufficient nexus between the contraband to be seized and the place to be searched.”<sup>197</sup> The magistrate “must find, based on facts existing when the warrant is issued, that there is probable cause to believe the contraband . . . will be there when the warrant is executed.”<sup>198</sup> This normally may be satisfied by a “controlled delivery of [the] contraband to the place to be searched.”<sup>199</sup> In cases such as this, however, where the contraband is delivered somewhere other than the place to be searched, the warrant “must present additional facts establishing [probable cause that] the contraband will be taken to the place” to be searched.<sup>200</sup> In this case, the only support for the assumption that the defendant would take the videotape to his home was the affiant’s statement that he believed that the defendant would behave in this manner.<sup>201</sup> There was no other evidence that the defendant had ever taken child pornography from his post office box to his home.<sup>202</sup>

While the defendant gave agents his home address, he “consistently stated” that he wanted sexually explicit materials sent *only* to his post office box.<sup>203</sup> In addition, the defendant told agents that he only kept “the stuff that’s legal” in his house.<sup>204</sup> The government argued that even if the affidavit was insufficient to show that he kept any other child pornography at his home, the judge could have inferred that the tape would be there “based on the logical inference that [the defendant] would, at least, take it home with him to view [it].”<sup>205</sup> This contention, however, was still unsupported by the record, as the government had no evidence to support the conclusion that the defendant was more likely to view the tape “at his home as opposed to some other location.”<sup>206</sup> The government thus failed “to provide the requisite nexus between the contraband” and the place to be searched, *i.e.*, the defendant’s home.<sup>207</sup> Agents executing the search, however, relied on the warrant in good

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196. *Id.* at 364.

197. *Id.* at 365 (citations omitted).

198. *Id.* (citations omitted).

199. *Id.* (citations omitted).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 366 n.2.

204. *Id.* at 366.

205. *Id.* at 366.

206. *Id.* (citations omitted).

207. *Id.* at 367.

faith, so the evidence seized from the defendant's home was not suppressed.<sup>208</sup>

#### *Fourth Circuit Court of Appeals*

Like the Third Circuit, the three Fourth Circuit cases dealing with anticipatory search warrants involved child pornography. In *United States v. Goodwin*,<sup>209</sup> the government used "various means" to identify persons "predisposed towards [an interest] in child pornography," usually by answering advertisements the government placed in sexually explicit magazines and by use of Customs Service lists of people who previously had obscene material sent to them from overseas which had then been seized.<sup>210</sup>

In this case, the defendant placed an advertisement in a magazine stating that he wished to buy child pornography.<sup>211</sup> "Test correspondence" from undercover government agents revealed that the defendant placed the advertisement, and he replied saying that he wished to buy child pornography, and that his interests included "teenage and pre-teenage sexual activity involving both heterosexual and homosexual activity."<sup>212</sup>

Four years later, "based on substantial previous evidence of predisposition," the government sent another solicitation letter "plainly focused on child pornography."<sup>213</sup> The defendant requested further information and the government sent him a catalog.<sup>214</sup> The defendant ordered four magazines from this catalog to be sent to his home address.<sup>215</sup> The company sent two magazines<sup>216</sup> to the defendant's home address and executed an anticipatory search warrant.<sup>217</sup>

As an initial matter, the court held that anticipatory warrants were proper in certain circumstances.<sup>218</sup> Where contraband is on a "sure course to its destination, as in the mail, prior issuance of a warrant is permissible."<sup>219</sup> Here, the affidavit established probable cause because the affidavit described the government's correspondence with the defen-

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208. *Id.* at 371.

209. 854 F.2d 33 (4th Cir. 1988).

210. *Id.* at 34.

211. *Id.*

212. *Id.* at 34-35.

213. *Id.* at 35.

214. *Id.*

215. *Id.*

216. The government mailed the defendant magazines it had "previously seized or purchased during Postal Inspection Service investigations." *Id.*

217. *Id.* at 36.

218. *Id.* at 36 (citations omitted).

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

dant in detail, including his specific request for child pornography and the fact that the materials would be sent to the defendant via United States Postal Service.<sup>220</sup>

*United States v. Dornhofer*,<sup>221</sup> decided a little more than two months subsequent to *Goodwin*, reaffirmed *Goodwin*'s position that "an anticipatory search warrant [was] permissible 'where the contraband to be seized is on a sure course to its destination,' as in the mail.'"<sup>222</sup> *Dornhofer*'s facts were largely similar to *Goodwin*'s and involved the same sting operation.<sup>223</sup> Here, the defendant ordered magazines containing child pornography.<sup>224</sup> Having previously obtained an "anticipatory search warrant, conditioned on [an agent's] placing the child pornography in the mail," a government agent mailed the child pornography to the defendant's address.<sup>225</sup> Agents watched the defendant remove the magazines from his mailbox and take them into his apartment.<sup>226</sup> Agents executed the warrant and seized the magazines they had just sent, as well as some other material.<sup>227</sup>

The court held the anticipatory search warrant to be valid.<sup>228</sup> The affidavit in support of the application for the warrant stated that the agent would place the material in the mail and that the material would be delivered to the defendant.<sup>229</sup> The issuing magistrate "conditioned the validity of the search warrant on the contraband being so placed in the mail."<sup>230</sup> Once the agent placed the material in the mail, *Goodwin*'s "sure course" requirement was met.<sup>231</sup>

*United States v. Cedelle*<sup>232</sup> also concerned a sting involving child

220. *Id.* at 36.

221. *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988).

222. *Id.* at 1198 (quoting *Goodwin*, 854 F.2d at 36).

223. *Id.* at 1197. The operation worked as follows:

The government set up a Hong Kong company known as Far Eastern Trade Company which solicited orders for child pornography from those suspected of being consumers of child pornography. The sting operation targeted [the defendant] as a result of a U.S. Customs seizure of child pornography that was addressed to [the defendant]. Far Eastern sent a letter to [the defendant] offering to provide a catalog of pornographic materials involving children. [The defendant] responded.

*Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* The other materials included "a notebook made by [the defendant] that included pictures of nude children, four novels and several magazines." *Id.*

228. *Id.* at 1198.

229. *Id.*

230. *Id.* It is unclear whether the warrant was conditioned on any event other than the material being placed into the mail, such as the defendant accepting delivery of the material and taking it into his home.

231. *Id.*

232. 89 F.3d 181 (4th Cir. 1996).

pornography. In that case, the defendant replied to a government advertisement in an adult magazine offering the sale of child pornography.<sup>233</sup> The defendant sent a letter requesting videotapes of "young girls."<sup>234</sup> An undercover postal inspector replied, asking the defendant about his specific interests.<sup>235</sup> The defendant replied, stating that he wanted "some video VHS of young girls about 11-15 [years old] more or less in any type of sexual activities."<sup>236</sup> Postal inspectors again replied, this time indicating availability of specific child pornography, and the defendant replied again, stating that "he was 'very interested[;] 12 [years old] or younger [was] nice' if it showed the minors engaged in not merely fellatio but also copulation."<sup>237</sup> In one last letter, undercover officials communicated to the defendant that "a videotape and some photographs that met his expressed interests were available for \$50.00," and the defendant ordered all of them.<sup>238</sup>

The materials were mailed to the defendant's home address in the name of an alias the defendant had given the undercover authorities.<sup>239</sup> The inspectors then waited for the defendant to pick up his mail, which he did a short time later.<sup>240</sup> Instead of parking his car and going into his home, however, the defendant drove away with the package.<sup>241</sup> After executing a traffic stop, the inspectors arrested the defendant and searched his car, seizing the package.<sup>242</sup> The inspectors then searched the defendant's home on the basis of an anticipatory search warrant they had earlier obtained.<sup>243</sup>

In denying the defendant's appeal of the district court's denial of his suppression motion, the court briefly touched on the argument that the search warrant of the defendant's home lacked probable cause.<sup>244</sup> The court simply cited *Goodwin* and stated that the argument was "without merit."<sup>245</sup>

### *Fifth Circuit Court of Appeals*

The Fifth Circuit has thus far only found one occasion on which to

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233. *Id.* at 183.

234. *Id.*

235. *Id.*

236. *Id.* (alteration in original).

237. *Id.* (alterations in original).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 183-84.

243. *Id.*

244. *Id.* at 186

245. *Id.* (citing *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988)).

address the issue of anticipatory search warrants. In *United States v. Wylie*,<sup>246</sup> someone mailed a package to Minnesota from Texas via UPS.<sup>247</sup> UPS searched the package and found cocaine.<sup>248</sup> UPS gave the package to police in Texas, who gave it the Texas DEA.<sup>249</sup> The DEA then sent the package to its Minnesota office.<sup>250</sup>

DEA agents wished to arrange a controlled delivery to the package's mailing address, but it was a motel and the addressee had already checked out, leaving instructions for the package to be shipped back to Texas to the defendant.<sup>251</sup> An agent called the number that the addressee had left, and the woman (the defendant) with whom the agent spoke claimed to be the addressee's wife.<sup>252</sup> She told the agent "someone would be [at the Texas address] to receive the package."<sup>253</sup> The package was shipped back to Texas, and "[o]nce the package was delivered to [the defendant's] residence, a search warrant was obtained."<sup>254</sup>

The defendant argued that the affidavit in support of the warrant lacked probable cause.<sup>255</sup> The court held that the affidavit supplied demonstrated probable cause, in part because of the fact that the UPS package containing the drugs had actually been delivered and accepted at the defendant's residence.<sup>256</sup> Given this consideration, it is difficult to understand why the court stated that the case "involve[d] the issuance by a magistrate of an anticipatory search warrant that authorizes the search of premises when it is known that the contraband is on a sure course to its destination there."<sup>257</sup> Nonetheless, the court "approv[ed] of the use of anticipatory search warrants in appropriate instances," and stated that "[t]he present case involves the issuance by a magistrate of an anticipatory search warrant that authorizes the search of premises when it is known that contraband is on a sure course to its destination."<sup>258</sup>

### *Seventh Circuit Court of Appeals*

The first federal court decision addressing the constitutionality of

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246. 919 F.2d 969 (5th Cir. 1990).

247. *Id.* at 971.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 974.

256. *Id.* at 975.

257. *Id.* at 974. In fact, the affidavit "described how the UPS package was delivered to [the defendant's] ranch and accepted by its occupants." *Id.* at 975.

258. *Id.* at 974.



anticipatory search warrants was *Beal v. Skaff*.<sup>259</sup> In *Beal*, federal agents observed that a package sent by first class mail to the defendant was "leaking" marijuana.<sup>260</sup> State authorities in Wisconsin applied for a warrant to search the defendant's home for the package which, according to the affidavit, "will be delivered at or about 12:34 P.M., on October 24, 1967, by carrier delivery to [the defendant's home]."<sup>261</sup> The warrant was issued at 12:15 P.M., October 24, while the package had been delivered at 11:59 A.M. that day.<sup>262</sup> Police searched the defendant's home at 12:45 P.M.<sup>263</sup>

The defendant argued that the warrant was invalid, as it did not state that the contraband was *presently* in the defendant's home, but *would be* at the time police were to search the home.<sup>264</sup> The court stated that although "a 'stale warrant,' the execution of which is unduly delayed by the police in order to assure the seizure of the goods sought, is invalid," this warrant was valid, as the police "obeyed the command of the search warrant to execute it forthwith."<sup>265</sup> Probable cause existed because "there was probable cause to believe that the parcel would be delivered 19 minutes from the time of issuance, and probable cause to believe that the warrant, when executed forthwith, could not be executed until after such delivery took place," due to the sixteen-mile distance "between the place of issuance and the place of execution."<sup>266</sup>

No Seventh Circuit case again addressed the validity of an anticipatory search warrant until 1996, when *United States v. Leidner* was decided.<sup>267</sup> In that case, Missouri police stopped a person for a traffic violation.<sup>268</sup> During the stop, police found 200 pounds of marijuana in the trunk of his car.<sup>269</sup> The driver told police that he rented the car to transport the marijuana from Texas to Illinois, that the defendant had agreed to pay him to do it, and that the defendant had paid him to do it

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259. 418 F.2d 430 (7th Cir. 1969).

260. *Id.* at 431.

261. *Id.* at 432.

262. *Id.*

263. *Id.*

264. *Id.* The defendant based his argument on "the Fourth Amendment guarantee that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be searched.'" *Id.* at 432-33 (quoting U.S. CONST. amend. IV).

265. *Id.* at 433.

266. *Id.* In addition, the court noted the need for "quick action by the magistrate," due to the "very real possibility that delay might have resulted in [the contraband's] disposal or concealment." *Id.* at 433-34.

267. 99 F.3d 1423 (7th Cir. 1996).

268. *Id.* at 1424.

269. *Id.*

“on previous occasions.”<sup>270</sup> The driver then agreed to become an informant, make a controlled delivery, and wear a wire during the controlled delivery.<sup>271</sup>

An Illinois law enforcement agent was contacted and agreed to cooperate.<sup>272</sup> The agent submitted an affidavit for a search warrant stating that the agent “had probable cause to believe that the marijuana *would be* located at [the defendant’s] residence based on the information obtained from [the informant] during the traffic stop by the Missouri police.”<sup>273</sup> The magistrate issued the warrant, but the warrant did not require that it be executed only after the informant made the delivery.<sup>274</sup> The agent, however, testified at the suppression hearing that the issuing magistrate told him “that since the warrant was an *anticipatory* search warrant [the agent] had to wait until [the informant] made the delivery to [the defendant’s] residence before he could execute it.”<sup>275</sup>

The informant made the controlled delivery at the defendant’s home, but the defendant was not there at the time of the delivery.<sup>276</sup> Someone else was, though, and that person accepted delivery.<sup>277</sup> Police waited for the defendant to return home, at which time they executed the search warrant.<sup>278</sup>

Of the defendant’s numerous arguments, the two most relevant were that the warrant failed to ensure the marijuana was on a “sure course” to the defendant’s residence (thus no nexus between the defendant’s residence and the contraband) and that the warrant failed to explicitly condition its execution upon completion of the controlled delivery.<sup>279</sup>

The court held that the warrant was valid, stating that “the alleged transfer of contraband would occur at [the defendant’s] residence, that the affiant learned of this transfer from an informant, that the affiant

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270. *Id.*

271. *Id.*

272. *Id.* The agent was an inspector for the Southeastern Illinois Drug Task Force to whom the informant was “known.” *Id.*

273. *Id.* The affidavit also stated that the informant “‘was in the process of delivering said cannabis to [the defendant] at [the defendant’s] residence;’ that [the affiant] considered the informant’s statements to be reliable since they were offered against the informant’s penal interest; and that [the informant] ‘agreed to cooperate with law enforcement personnel.’”

274. *Id.* at 1425.

275. *Id.* at n.1.

276. *Id.* at 1425.

277. *Id.*

278. *Id.*

279. *Id.* The defendant also argued that the warrant was invalid “because it failed to describe the role to be played by the police in the delivery . . . it failed to include time restraints, and . . . it failed to reflect that the issuing magistrate exercised a supervisory function as a neutral and detached magistrate.” *Id.* at n.2.

considered the informant reliable due to his against-interest statements, and that the transfer would occur through a controlled delivery in cooperation with the police."<sup>280</sup> The fact that the warrant did not state that it could not be executed until delivery did not render the warrant unconstitutional.<sup>281</sup> Finally, the court held that "all that is constitutionally required is that the search warrant be supported by probable cause."<sup>282</sup>

The defendant also argued that "the complaint failed to provide an independent nexus between the marijuana and [the defendant's] residence" and "that the contraband was on a 'sure course' to the defendant's home."<sup>283</sup> The defendant argued that the government created the nexus itself, as the package was not mailed without police intervention.<sup>284</sup> Here, the informant could have said he was going to deliver the contraband to *anyone's* home in order to save himself.<sup>285</sup> In addition, the defendant argued that even if the judge had instructed the officers not to execute the warrant until the delivery was made, the government had not demonstrated that all officers participating in the warrant's execution were told this.<sup>286</sup>

The court rejected both of the defendant's arguments. This was, the court stated, "essentially a government-controlled delivery" and that the "totality of the circumstances" indicated that the contraband was on a "sure course" to the defendant's home.<sup>287</sup> Also, the facts averred in the affidavit, taken in the totality of the circumstances, provided a sufficient nexus between the contraband and the defendant's home.<sup>288</sup>

In *United States v. Dennis*,<sup>289</sup> a postal inspector observed a package addressed to the defendant's residence that "matched a narcotics package profile developed by the United States Postal Service."<sup>290</sup> A drug-

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280. *Id.* at 1427. Thus, "the warrant would survive scrutiny under *Garcia*." *Id.*

281. *Id.* at 1427, 1430 ("the lack of explicit conditioning language does not constitute a constitutional defect").

282. *Id.* at 1427.

283. *Id.*

284. *Id.* at 1428. That is:

[The defendant's] "'sure course' argument . . . challenges whether the contraband was on a sure course to [the defendant's] house *before* [the informant] was arrested. In other words, [the defendant] argues that the warrant must show a connection between [the defendant] and the contraband due to arrive at his house independent of [the informant's] accusations.

*Id.* at 1429 n.7.

285. *Id.* at 1429.

286. *Id.*

287. *Id.* at 1429-30.

288. *Id.*

289. 115 F.3d 524 (7th Cir. 1997).

290. *Id.* at 527. The court stated, however:

The mere fact that certain characteristics that a law enforcement officer observes fit a profile will not establish reasonable suspicion . . . . Here, the postal inspector

sniffing dog indicated the presence of narcotics, and a subsequent search, pursuant to a warrant, revealed about sixteen ounces of cocaine.<sup>291</sup> The package was resealed, and a search warrant was obtained in preparation for a controlled delivery.<sup>292</sup>

A postal inspector delivered the package the next day.<sup>293</sup> The defendant signed for the package and took it into his home.<sup>294</sup> Police executed the search warrant and found the package, but did not find any other evidence of narcotics trafficking.<sup>295</sup>

The defendant argued that the warrant was defective for two reasons.<sup>296</sup> First, he argued that it did not contain the triggering event on its face or attach the affidavit containing that event to the warrant itself.<sup>297</sup> Second, the defendant argued that no nexus existed between the package and the place to be searched, in part because the affidavit “sought permission to determine which apartment would be searched at the time of the controlled delivery, based upon who accepted the package and into which apartment it was taken.”<sup>298</sup>

The court rejected the defendant’s arguments, first stating that the warrant need not list the conditions precedent on its face or attach the

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stated that the package aroused his suspicion because it was heavily taped, had been sent from a private person to another private person, had been mailed from Los Angeles, a city known to be a source city for narcotics distribution, and had been mailed from a zip code different than the zip code listed in the return address. The postal inspector explained that based on his five years of experience as a narcotics investigator and based upon the narcotics package profile, these factors were consistent with characteristics of other packages found to contain contraband. For example, he explained that because of its high cost, only about five percent of all Express Mail is personal correspondence and that because of its speed and reliability and because the postal service provides a free telephone tracking service, drug traffickers frequently use the service to send personal correspondence containing contraband. Thus, he concluded that personal correspondence sent via Express Mail is likely to contain contraband.

*Id.* at 532.

For a thorough discussion on the “resoundingly unexceptional” nature of these characteristics as indicators of criminal behavior, see *id.* at 535-40 (Ripple, J., concurring in part and dissenting in part).

291. *Id.* at 527. The court stated that it would “uphold the detention here if the postal inspector reasonably suspected that the package contained contraband and if the detention lasted for a reasonable duration.” *Id.* at 532. The inspector possessed reasonable suspicion. *Id.* And because the detention lasted for “less than forty-eight hours and lasted only as long as necessary to subject the package to a canine sniff,” the search was not for an unreasonable duration. *Id.* at 533.

292. *Id.* at 527. Only “a portion of the cocaine” and “an electronic beeper” were placed in the package.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 528.

297. *Id.*

298. *Id.*

affidavit to the warrant so long as the affidavit does contain the conditions precedent and the executing officers actually satisfy those conditions.<sup>299</sup> The warrant here satisfied that requirement because the warrant itself stated that execution of it was subject to the conditions precedent specified in the affidavit.<sup>300</sup> Further, the officers executing the warrant complied with the instructions of the affidavit.<sup>301</sup>

The court next set out its discussion of a nexus requirement between the package and the place to be searched, stating that one example of a sufficient nexus would be showing that the contraband was on a "sure course" to the place to be searched.<sup>302</sup> Here, there was more of a nexus than in *Leidner*, as there was nothing in the record indicating that the contraband may not have been delivered to the defendant's residence.<sup>303</sup> Discovering a package in the normal mail stream and subsequently replacing it into that stream should satisfy the sure-course requirement.<sup>304</sup>

In *United States v. Brack*,<sup>305</sup> the defendant was convicted of conspiracy to distribute crack cocaine.<sup>306</sup> The defendant sought suppression of the evidence seized from his hotel room on the basis that the affidavit did not present independent evidence to support probable cause that the contraband would be located in the hotel room at the time of the search. The defendant also argued that the affidavit failed to present evidence that the contraband was on a sure course to the place to be searched.<sup>307</sup>

In this case, an informant told police that the defendant was selling drugs out of a certain hotel room.<sup>308</sup> A second informant made "controlled purchase" of narcotics from the defendant's room, and the description of the defendant matched that given by the original inform-

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299. *Id.* at 529. "[C]onditions precedent to the execution of the warrant are integral to its validity." *Id.* at 528.

300. *Id.* at 529.

301. *Id.*

302. *Id.* at 530. The court disagreed with the defendant's argument that the government should be required to "show[] that [the defendant] or one of his agents mailed the package in Los Angeles. However, we implicitly rejected this argument in *Leidner* . . . adopting instead a 'totality of the circumstances' approach." *Id.* at 531.

303. *Id.* at 531.

304. *Id.* at 530. No other circumstances indicating that the sender intended the package to arrive at the place to be searched or that the package was intended for the actual recipient, although under this approach the court claims that the warrant would have still be valid, given the amount of cocaine mailed and the trouble through which the sender went to conceal its contents. *Id.* at 530. That is, sixteen ounces of cocaine "is too great an amount to be sent on a whim . . . [and] investigators had connected [the defendant] to narcotics activities in the past." *Id.* at 530-31.

305. 188 F.3d 748 (7th Cir. 1999).

306. *Id.* at 753.

307. *Id.* at 757.

308. *Id.* at 755. The informant also told police that the defendant was a bald, six-foot-tall African-American male weighing 160 pounds. *Id.*

ant.<sup>309</sup> A third informant told police that the defendant and man named Smith would be driving to Chicago to buy cocaine and would return on one of two nights.<sup>310</sup>

“Based on this information, police sought and obtained a search warrant contingent on the return of Smith and/or a black male meeting the description of [the defendant]” to the hotel room on one of the two nights the informant specified.<sup>311</sup> On the first evening, police saw the defendant return to the room and they executed the warrant, “seizing drugs, a scale, a pager, and some clothes.”<sup>312</sup>

The defendant questioned the informant’s reliability, but the court held that the informants proved themselves reliable because the controlled purchase by one informant confirmed that the defendant was selling drugs out of the hotel room, and the other informant’s prediction about the defendant’s travel plans was “borne out.”<sup>313</sup> Once the defendant returned to the hotel room, as predicted by the informant, the triggering event for the search occurred.<sup>314</sup>

The court held that the sure-course requirement was not applicable in this case, as that requirement “is to prevent law enforcement authorities or third parties from mailing or otherwise sending a controlled substance to a residence to ‘create probable cause to search the premises where it otherwise would not exist.’”<sup>315</sup> In this case, “neither the government nor a third party was involved in delivering the contraband to [the hotel room]. The drugs were delivered by [the defendant] himself.”<sup>316</sup>

In *United States v. Limares*,<sup>317</sup> a narcotics dog alerted postal inspectors to the presence of narcotics in a package.<sup>318</sup> Postal inspectors opened the package and found more than four pounds of methamphetamine.<sup>319</sup> The package was resealed with a radio transmitter that would signal the package’s location and whether it had been opened, and an anticipatory warrant was obtained to enter the premises of the mailing address “after the delivery and opening of the package.”<sup>320</sup>

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309. *Id.*

310. *Id.* at 756.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 757 (quoting *United States v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997)).

316. *Id.*

317. 269 F.3d 794 (7th Cir. 2001).

318. *Id.* at 796.

319. *Id.*

320. *Id.*

Agents made the delivery and someone signed for the package and took it into the home.<sup>321</sup> Minutes later, however, that person left the house with the unopened package.<sup>322</sup> The package was taken to another house (the defendant's), and, as agents were trying to get a warrant for the defendant's house, the transmitter indicated that the parcel had been opened.<sup>323</sup> Believing that whoever opened the package would notice the transmitter and attempt to destroy the package's contents and all other evidence in the house, and without attempting to secure a second warrant, agents immediately executed the warrant at the defendant's house.<sup>324</sup>

The defendant argued that agents violated the Fourth Amendment by entering his home without a warrant.<sup>325</sup> He responded to the government's argument that they entered the house to stop the destruction of evidence by stating that the government created the exigency by allowing his friend to walk from the original house to the other without arresting him, thus allowing the occupants of the defendant's house to open the package.<sup>326</sup>

The court held for the government, stating that government agents do not have to make arrests at the earliest possible moment.<sup>327</sup> They may continue their investigation to acquire additional evidence.<sup>328</sup> And if exigent circumstances intervene, created here by one suspect moving the contraband from one house to another (for which agents could not have obtained an anticipatory warrant), then the agents may act to protect evidence from being destroyed.<sup>329</sup>

### *Eighth Circuit Court of Appeals*

*United States v. Tagbering*<sup>330</sup> was the first Eighth Circuit case to address the question of anticipatory search warrants. In *Tagbering*, the United States Customs Service in Miami inspected a package sent from Jamaica to Kansas City, Missouri.<sup>331</sup> Inside the package, agents found a large amount of illegal drugs.<sup>332</sup> Agents resealed the package for a con-

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321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 796-97.

325. *Id.* at 798.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 799.

330. 985 F.2d 946 (8th Cir. 1993).

331. *Id.* at 948.

332. *Id.* Agents found 900 grams of hashish oil and 142 grams of marijuana. *Id.*

trolled delivery and sought an anticipatory search warrant.<sup>333</sup> The affidavit in support of the warrant application stated that the warrant would not be executed “unless delivery occurs and the package is accepted.”<sup>334</sup>

The controlled delivery occurred, and the defendant accepted the package and took it inside the house.<sup>335</sup> Minutes later, police executed the warrant, arrested the defendant, and found the unopened package on a kitchen counter.<sup>336</sup>

The defendant’s main argument was that the warrant was invalid, as it did not expressly condition the search upon a successful controlled delivery “nor state that the warrant would be void if delivery did not occur.”<sup>337</sup> The court held, however, that the warrant “fairly construed, did contain” the condition that the search was contingent on the controlled delivery because the affidavit contained that contingency.<sup>338</sup> The judge signed the affidavit and attached copies of it to the warrant.<sup>339</sup> Since the contingency was contained in the affidavit, it need not be contained in the warrant itself.<sup>340</sup> Also, if police executed the warrant before the controlled delivery, “then suppression may well be warranted for that reason.”<sup>341</sup>

Decided only a few months subsequent to *Tagbering*, *United States v. Koelling*<sup>342</sup> dealt with an anticipatory warrant for child pornography. In *Koelling*, a mail order photo-finishing business called police and said they had film that they suspected contained child pornography.<sup>343</sup> The name on the return address was false, and the real occupant of the address, “as a result of prior investigations . . . was known to have a ‘preference for young boys.’”<sup>344</sup> The photographs depicted images of a fourteen-year-old boy identified by the boy’s principal as living near the defendant.<sup>345</sup> Police applied for a search warrant based on these facts as

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333. *Id.* Most of the drugs were replaced with “look-alike substances.” *Id.*

334. *Id.* The affidavit was prepared by a Kansas City detective who conducted surveillance of the apartment to be searched and determined that it was likely occupied.

335. *Id.*

336. *Id.* at 949.

337. *Id.* at 950. The defendant also argued that the warrant was invalid because it did not allege that the address to be searched was occupied, “that the package would be placed in the mail for delivery,” and “that the addressee would be there to receive the package when delivered.” *Id.*

338. *Id.*

339. *Id.*

340. *Id.* It did not matter that the “affidavit was not incorporated into the warrant, [because] it contained a representation to the issuing judge that the warrant would not be executed until the package was delivered and accepted.” *Id.*

341. *Id.*

342. 992 F.2d 817 (8th Cir. 1993).

343. *Id.* at 818.

344. *Id.* at 819.

345. *Id.* The defendant was also in some of the pictures. *Id.*



well as affiant's statement that "based on my training and previous experience, I know that [the defendant] exhibits the traits common to many pedophiles. I further know from this training and previous experience that pedophiles or collectors of this matter keep these materials for many months and years, and rarely, if ever, dispose of their collections."<sup>346</sup> The affidavit also stated that the search warrant would be executed when the defendant received the package in his mail and took it into his home.<sup>347</sup>

The magistrate issued the warrant, and the controlled delivery and execution of the warrant proceeded as planned.<sup>348</sup> The court held that the warrant was valid:<sup>349</sup> "the statement in the affidavit that the warrant would not be executed until delivery of the package to [the defendant's] house could be confirmed was sufficient to establish probable cause for the issuance of the warrant since the package would likely be found on the premises."<sup>350</sup> The officers complied with these conditions before executing the warrant, so suppression was not required.<sup>351</sup>

In *United States v. Bieri*,<sup>352</sup> an Oklahoma State Trooper stopped a drug courier who was transporting marijuana from Arizona to the defendant's farm in Missouri.<sup>353</sup> The trooper searched his car, finding forty-five pounds of marijuana.<sup>354</sup> The courier then agreed to show authorities where he was taking the marijuana (a place to which he claimed he had previously delivered marijuana) and agreed to tape it.<sup>355</sup> Police then submitted an affidavit for an anticipatory search warrant, which the judge granted with directions for the officers "to execute the warrant only if [informant] made the delivery and the facts developed as the officers expected."<sup>356</sup> The informant delivered the marijuana, was paid by the defendant, and the warrant was executed.<sup>357</sup>

346. *Id.* at 819-20.

347. *Id.* at 820.

348. *Id.*

349. *Id.* at 823.

350. *Id.*

351. *Id.* Specifically, the court stated:

[A]fter the postal inspector observed the delivery of the photo mailing envelope, he waited 5 to 10 minutes before executing the search warrant. Since [the defendant] was discovered in possession of the photographs when the postal inspector entered his house, it is clear that the execution of the warrant occurred after the controlled delivery had taken place.

*Id.*

352. 21 F.3d 811 (8th Cir. 1994).

353. *Id.* at 814.

354. *Id.*

355. *Id.*

356. *Id.* The judge issued the warrant "after reviewing the deputy sheriff's affidavit, oral statements, and an aerial photograph of the [defendants'] property." *Id.*

357. *Id.*

The defendant argued that the warrant was invalid because there were no exigent circumstances and that the warrant was unsupported by probable cause.<sup>358</sup> Exigent circumstances, the court stated, are not necessary: “An anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery.”<sup>359</sup> The government showed that the warrant was supported by probable cause because “[p]robable cause exists when there are sufficient facts to justify the belief by a prudent person that contraband or evidence of a crime will be found in the place to be searched.”<sup>360</sup> Here, the totality of the circumstances supported a finding of probable cause.<sup>361</sup>

*United States v. Tellez*<sup>362</sup> also involved police use of an informant. There, a police informant called the defendant and requested to purchase methamphetamine.<sup>363</sup> The defendant agreed, and brought the methamphetamine to the informant’s house.<sup>364</sup> Later that day, informant called the defendant again to arrange the sale of more methamphetamine.<sup>365</sup> The defendant agreed, and said that he would bring it to the informant within a few hours.<sup>366</sup>

Officers then prepared an affidavit setting forth the facts above, which they witnessed.<sup>367</sup> The affidavit asked that the warrant to search the defendant’s home be granted in the event that narcotics were found on the defendant or his vehicle.<sup>368</sup> The magistrate issued the warrant and it was executed as planned.<sup>369</sup>

The defendant argued that there was no nexus between the search

358. *Id.* The defendants also argued that “the warrant did not comply with state law . . . was overbroad in the description of the place to be searched . . . did not comply with *Federal Rule of Criminal Procedure 41*” and “was not executed in good faith.” *Id.*

359. *Id.* (citing *United States v. Tagbering*, 985 F.2d 946 (8th Cir. 1993)). Also, it did not matter that the “affidavit was not incorporated by reference into the search warrant.” *Id.* at 815. In this case at least, “it [is] immaterial whether the application for the warrant contained specific words of incorporation, because the application itself contains an adequate legal description describing the farm and a reference to an accompanying aerial photograph,” so the warrant was not void for vagueness. *Id.*

360. *Id.*

361. *Id.* “[P]robable cause existed because the officers had apprehended [the informant] with approximately forty-five pounds of marijuana, and he told them he was delivering it to the [the defendants’] farm.” *Id.*

362. 217 F.3d 547 (8th Cir. 2000).

363. *Id.* at 549.

364. *Id.* Police then followed the defendant to his home, which they kept under surveillance. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* All of these events occurred in the span of one day. *Id.*

of his car and the probability that drugs would be found in his home.<sup>370</sup> This case was easy for the court, however; it held that the affidavit set forth facts that “create a substantial basis for the magistrate to find that there was probable cause to search [the defendant’s] home, even if the proposed condition (*i.e.*, the discovery of narcotics on [the defendant’s] person or in his car) never occurred.”<sup>371</sup>

The most recent Eighth Circuit case to address anticipatory search warrants was *United States v. Walker*.<sup>372</sup> In *Walker*, the defendant allowed a gang (which had been under investigation by the DEA) to deliver packages (via Express Mail) of crack cocaine from California to her St. Paul residence.<sup>373</sup>

A postal inspector in Los Angeles noticed one such package and found it to be suspicious.<sup>374</sup> The inspector sent the package through to St. Paul and told a postal inspector there that the package was on its way.<sup>375</sup>

Once it arrived at St. Paul, the inspector there agreed that the package was suspicious and subjected it to a test by a drug-sniffing dog.<sup>376</sup> The dog singled out the package addressed to the defendant, and a search pursuant to a warrant revealed cocaine.<sup>377</sup> After a controlled delivery to the defendant’s address, agents searched her apartment.<sup>378</sup>

The defendant argued that the warrant was not supported by probable cause as “it failed to describe with particularity the places to be searched or the items to be seized.”<sup>379</sup> The court disagreed, stating:

370. *Id.*

371. *Id.* This is so because:

The facts alleged in the affidavit indicate that [the defendant] was a drug dealer and had offered to provide drugs in the future on demand. The informant had spoken with [the defendant] over the telephone and had arranged for another sale. The new sale was to take place in the immediate future, and the police knew that [the defendant] had been at home and not anywhere else since leaving the informant’s residence.

*Id.*

372. 324 F.3d 1032 (8th Cir. 2003).

373. *Id.* at 1035.

374. *Id.* The inspector became suspicious of the package because it “was a large U-Haul box with handwritten labels. It had been dropped off at an airport facility sixty miles from the sender’s purported residence. The sender brought the package to the facility in a rental car, and paid the delivery charge in cash.” *Id.*

375. *Id.*

376. *Id.* The St. Paul inspector found the package suspicious because in twenty-one years as a postal inspector (nine years in the narcotics division), “he had seen ‘probably a hundred’ U-Haul type boxes that contained narcotics” and testified “that Los Angeles is known as a drug source city where many narcotics packages originate.” *Id.* at 1035-36.

377. *Id.* at 1036.

378. *Id.*

379. *Id.* at 1038.

An anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery. Probable cause exists when there are sufficient facts to justify the belief by a prudent person that contraband or evidence of a crime will be found in the place to be searched.<sup>380</sup>

The government met that burden here, as the warrant affidavit stated that the package was addressed to the defendant, that a search of the package had revealed narcotics, that the agents intended to make a controlled delivery to the address, and “that other evidence relating to identification of the residents” would be present.<sup>381</sup>

### *Ninth Circuit Court of Appeals*

In *United States v. Weber*,<sup>382</sup> an agent applying for a search warrant alleged the following facts: Two years prior to the filing of the affidavit, a customs inspector seized a parcel addressed to the defendant at his address.<sup>383</sup> The package contained “two pieces of advertising material, which the customs inspector concluded ‘apparently depict[ed] the sexual exploitation of children.’”<sup>384</sup> Customs officials did not determine whether the defendant ordered the material or if it was sent unsolicited.<sup>385</sup>

On this basis, the defendant was targeted for investigation.<sup>386</sup> The government sent the defendant “an undercover test advertisement containing the name and address of a purported distributor of sexually explicit materials” selling pictures of “boys and girls in sex action.”<sup>387</sup> Without seeing the pictures, the defendant ordered some.<sup>388</sup> A Customs agent dressed as a delivery company courier was to deliver the pictures.<sup>389</sup> The affidavit stated that agents believed that the defendant not only would have these photographs in his possession, but other illegal pornographic material as well.<sup>390</sup> This assumption was based on the facts “and a general description of the proclivities of pedophiles.”<sup>391</sup>

380. *Id.* (quoting *United States v. Tagbering*, 985 F.2d 946, 949 (8th Cir. 1993) and *United States v. Bieri*, 21 F.3d 811, 814 (8th Cir. 1994)) (internal citations omitted).

381. *Id.*

382. 923 F.2d 1338 (9th Cir. 1990).

383. *Id.* at 1340.

384. *Id.* (alteration in original).

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* The defendant saw only the advertisement. *Id.*

389. *Id.* “The pictures the government intended to send depicted minors displaying their genitals or engaging in various sexual acts . . . .” *Id.*

390. *Id.*

391. *Id.* The affidavit stated that pedophiles often videotape children and themselves, keep the

The warrant was signed and the material was mailed.<sup>392</sup> The defendant received it and took it into his home, whereupon the warrant was executed.<sup>393</sup> Agents found the unopened package as well as other magazines depicting child pornography.<sup>394</sup>

The court held that the warrant was invalid because it was overbroad, as it sought items for which there was no probable cause to search.<sup>395</sup> Thus, the affidavit established probable cause only for the material that the agents mailed.<sup>396</sup> The court noted that “nowhere in [the agent’s] affidavit is there even a conclusory recital that the evidence of [the defendant’s] demonstrated interest in child pornography — consisting of one proven order — places him in the category of those pedophiles, molesters, and collectors about whom [the agent] has expertise.”<sup>397</sup> Based on the facts of this case, the government would merely need to place “phony advertisements for child pornography, wait for responses, and immediately execute warrants to search the houses of those responding affirmatively.”<sup>398</sup>

In *United States v. Ruddell*,<sup>399</sup> the defendant wrote to an adult bookstore “inquiring about obtaining videotapes of minors engaged in sexually explicit conduct. The bookstore informed the United States Postal Inspection Service of [the defendant’s] interest in child pornography.”<sup>400</sup> An undercover agent replied, asking the defendant for more information regarding his specific interests in child pornography.<sup>401</sup> The defendant responded, and the agent sent the defendant “a list of five videotapes which depicted minors engaged in sexually explicit conduct.”<sup>402</sup> The defendant ordered one videotape and sent payment.<sup>403</sup>

Another agent filed an affidavit for a search warrant for the defendant’s home.<sup>404</sup> The agent wrote in the affidavit that she had “received training in the area of sexual exploitation of minors,” that she was told the defendant had ordered the videotape, and that she possessed the

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material around for long periods of time, and show the material to other children “to lower their inhibitions so that the pedophile may molest them.” *Id.* at 1341.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* at 1343. A warrant “must be no broader than the probable cause on which it is based.” *Id.* at 1342.

396. *Id.* at 1343.

397. *Id.* at 1341.

398. *Id.* at 1344.

399. 71 F.3d 331 (9th Cir. 1995).

400. *Id.* at 332.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

videotape and intended to deliver it to the defendant's home.<sup>405</sup> She also stated that an Assistant United States Attorney told her that controlled deliveries could provide probable cause for an anticipatory search warrant.<sup>406</sup> The magistrate issued the warrant and the controlled delivery was made.<sup>407</sup> Agents executed the warrant and recovered the tape from the defendant's home.<sup>408</sup>

Citing *United States v. Hale*,<sup>409</sup> the court stated "[a]n affidavit in support of an anticipatory search warrant must show that the property sought is on a sure course to the destination targeted for the search."<sup>410</sup> Here, a postal inspector "had explicitly described her plans to execute a controlled delivery to [the defendant's] house in her affidavit in support of the warrant."<sup>411</sup> Based on that, no doubt existed that the contraband was on a sure course to the defendant's home.<sup>412</sup>

In *United States v. Hotal*<sup>413</sup> the issue was whether an anticipatory search warrant violates the Fourth Amendment if it fails to identify the event.<sup>414</sup> In *Hotal*, the defendant ordered two videotapes of child pornography in response to an undercover government advertisement.<sup>415</sup> A postal inspector applied for an anticipatory warrant, stating in the affidavit that the tapes would be delivered to the defendant's residence.<sup>416</sup> The affidavit stated that the inspector would conduct surveillance of the package until someone at the residence brought it into the house, "and only when brought into the residence, this search warrant will be executed."<sup>417</sup> The warrant stated that the affidavit was attached "and incorporated by reference," but did not specify the triggering event.<sup>418</sup>

The delivery was made, the defendant took the tapes into his home, and the warrant was executed.<sup>419</sup> There was no evidence that the executing agents were in possession of the affidavit, or that the affidavit "in any manner accompanied the warrant."<sup>420</sup>

The court held that the warrant was invalid and all evidence seized

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405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. 784 F.2d 1465, 1468-69 (9th Cir. 1986).

410. *Ruddell*, 71 F.3d at 333.

411. *Id.*

412. *Id.*

413. 143 F.3d 1223 (9th Cir. 1998).

414. *Id.* at 1224.

415. *Id.* at n.2.

416. *Id.*

417. *Id.* at 1224-25.

418. *Id.* at 1225.

419. *Id.*

420. *Id.*

pursuant to it must be suppressed,<sup>421</sup> stating that “when a warrant’s execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow.”<sup>422</sup> Yet the court also stated that the triggering event does not have to actually appear only on the face of the warrant, but “must appear in the court-issued warrant and attachments that those executing the search maintain in their immediate possession in order to guide their actions and to provide information to the person whose property is being searched.”<sup>423</sup>

The most recent Ninth Circuit case on the subject was *United States v. Vesikuru*.<sup>424</sup> In *Vesikuru*, narcotics agents discovered a microwave with a jar of phencyclidine (PCP) being mailed to an address in Seattle.<sup>425</sup> A Seattle DEA agent applied for a warrant. The affidavit for the search warrant stated that the warrant was “anticipatory” and would become effective on observation of someone accepting the package and taking it into the residence.<sup>426</sup> A district court issued the warrant, indicating in the warrant that probable cause to search was based upon the affidavit and that the affidavit was attached to the warrant.<sup>427</sup> Agents delivered the package to the residence, and the defendant took it into the home.<sup>428</sup> The subsequent search produced crack cocaine, PCP, and marijuana.<sup>429</sup>

The defendant argued the warrant was invalid based on its failure to state on its face the conditions precedent to its execution.<sup>430</sup> The court reiterated the rule from *Hotel* that conditions precedent to a search must be stated in the warrant.<sup>431</sup> The court further stated that “a warrant may be construed with reference to the affidavit.”<sup>432</sup> The court went on to state, however, “that the affidavit must accompany the warrant and be

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421. *Id.* at 1228.

422. *Id.* at 1226.

423. *Id.* at 1227. “[I]n order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event.” *Id.*

424. 314 F.3d 1116 (9th Cir. 2002).

425. *Id.* at 1118. A drug-sniffing dog initially alerted agents to the package, who then opened it pursuant to a search warrant. *Id.* at 1117-18.

426. *Id.* at 1118.

427. *Id.* In addition, the court stated that “[a]t all relevant times prior to and during the search of [the defendant’s] home, the affidavit physically accompanied the search warrant.” *Id.* Also, “[t]he searching officers were fully briefed on the restrictions found in the affidavit, and the . . . officers complied with all of the required conditions.” *Id.* at 1117.

428. *Id.* at 1119.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 1120 (quoting *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1026 (9th Cir. 2002)). The warrant was supported by probable cause due to the sure course to its destination, so

incorporated by reference in order to be considered in conjunction with the warrant.”<sup>433</sup>

Unlike in *Hotal*, the affidavit did accompany the warrant when agents executed the search.<sup>434</sup> As this condition was satisfied and the government sufficiently demonstrated that the package was on a “sure course” to the place to be searched, the search was constitutional.<sup>435</sup>

### *Tenth Circuit Court of Appeals*

In *United States v. Hugoboom*,<sup>436</sup> a postal inspector working at Denver International Airport saw a suspicious express mail package addressed to an individual in Wyoming.<sup>437</sup> A drug-sniffing dog indicated the presence of narcotics in the package.<sup>438</sup> A subsequent search revealed 215 grams of ephedrine.<sup>439</sup>

Working with the Wyoming DEA, postal officials made arrangements to carry out a controlled delivery of the parcel.<sup>440</sup> The government asked a magistrate to issue a search warrant with execution “contingent upon the delivery of the parcel to a responsible adult at the residence . . . who willingly” accepts delivery.<sup>441</sup> The magistrate issued the search warrant, which was subsequently executed.<sup>442</sup>

The defendant argued that there was not sufficient probable cause to support the warrant because the affidavit referred only to the proposed controlled delivery and that there was no independent evidence of any other illegal narcotics activity going on at the defendant’s residence.<sup>443</sup> However, the court stated that the affidavit need only refer to the controlled delivery and show that the contraband is on a sure course to the place to be searched in order to satisfy probable cause.<sup>444</sup> In this case, the government satisfied that burden.<sup>445</sup> Additionally, the affidavit listed the condition precedent.<sup>446</sup> This was sufficient, as the warrant

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there was “a substantial basis for concluding that, once the package was accepted and taken into the residence, evidence relating to drug trafficking could be found therein.” *Id.* at 1122.

433. *Id.* at 1120 n.3.

434. *Id.* at 1122.

435. *Id.*

436. 112 F.3d 1081 (10th Cir. 1997).

437. *Id.* at 1083.

438. *Id.*

439. *Id.* The search was made pursuant to a warrant. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.* at 1086.

444. *Id.* at 1086-87.

445. *Id.*

446. *Id.* (“[u]pon delivery to a willing adult and upon obtaining a signed receipt for such delivery, the search warrant would then be executed”).



itself did not need to specify the triggering event.<sup>447</sup>

*United States v. Rowland*<sup>448</sup> dealt not with narcotics but with a controlled delivery of child pornography. A postal inspector learned that the defendant had filled out a questionnaire expressing an interest in child pornography.<sup>449</sup> He gave his name and the address of his post office box.<sup>450</sup> Three years later, the government mailed the defendant another advertisement.<sup>451</sup> The defendant replied, "indicating an interest in young girls, videotapes, magazines, and 'possibly meetings.'"<sup>452</sup> The government sent yet another letter, this one containing prices and descriptions of nine videotapes.<sup>453</sup> The defendant ordered two videotapes.<sup>454</sup> Subsequently, the government learned the defendant's identity, place of employment, and his home address.<sup>455</sup> They obtained an anticipatory warrant to search his residence, which could be executed "once the package containing the videotapes was brought into the residence."<sup>456</sup>

Agents then delivered the tapes to the defendant's mailbox.<sup>457</sup> The defendant received the package and took it to his place of employment.<sup>458</sup> He left work around 4:30 that afternoon, but agents could not determine whether he had the tapes.<sup>459</sup> The defendant drove home and went into his house, but agents still could not establish whether he had the tapes.<sup>460</sup> The agents knocked on the door, and the defendant's wife let them in.<sup>461</sup> They asked the defendant where the tapes were located, and he indicated that they were in a backpack about five feet away from him.<sup>462</sup> The agents then executed the search warrant.<sup>463</sup>

The court began its analysis by reciting the requirements for anticipatory search warrants. The issuing magistrate must determine that there is probable cause to believe that the items to be seized will be at

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447. *Id.*

448. 145 F.3d 1194 (10th Cir. 1998).

449. *Id.* at 1198-99.

450. *Id.* at 1199. The post office box was actually rented in another person's name, but the defendant "was authorized to receive mail there." *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.* at 1199-1200. The defendant told agents that the actual package in which the tapes were mailed was at his place of employment. *Id.*

463. *Id.* at 1200.

the place to be searched when it is searched.<sup>464</sup> In addition, probable cause for anticipatory warrants is contingent on the occurrence of a triggering event, so the magistrate must also consider the likelihood of the event's actual occurrence.<sup>465</sup> Next, the issuing magistrate must determine the likelihood that after the triggering event occurs, the contraband will be at the place to be searched (that is, there must be a sufficient nexus between the contraband and the search locale).<sup>466</sup> Lastly, the warrant or affidavit "should express conditions permitting the search to be conducted only after the [triggering event has] taken place."<sup>467</sup>

In this case, the affidavit provided probable cause to believe that the defendant's post office box would harbor criminal activity.<sup>468</sup> This determination alone, however, does not provide probable cause to believe that his house would contain the same criminal activity.<sup>469</sup> No evidence existed that he was likely to use his home to store contraband, or that he would take this particular contraband there.<sup>470</sup> The defendant's home was one of many possible destinations for the contraband,<sup>471</sup> and the mere inference that he would take the tapes home was insufficient probable cause to believe that the contraband would be in his house at the time the warrant was executed.<sup>472</sup> Despite that conclusion, the court held that the good-faith exception applied.<sup>473</sup>

The next Tenth Circuit case to address the validity of an anticipa-

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464. *Id.* at 1201.

465. *Id.* Thus, if the triggering event does not occur, the search warrant is void.

466. *Id.*

467. *Id.* at 1202. As for probable cause for government-controlled deliveries, the court stated, "when the affidavit refers to a controlled delivery of contraband to the place designated for search, the nexus requirement of probable cause is satisfied and the affidavit need not provide additional independent evidence linking the place to be searched to criminal activity." *Id.* at 1202-03.

468. *Id.* at 1204. In addition, the court stated:

When the delivery of contraband is not completely within the government's control, however, or when the delivery is to be made to a place other than the premises designated for search, additional reliable information in the warrant application must indicate that the contraband will be at the designated premises at the time of the search. For example, when the delivery of contraband is not within the control of the government, the supporting affidavit should show not only that the agent applying for the warrant believes a delivery of contraband is going to occur, but also how the agent learned of the expected delivery, how reliable the information is, and what the role of law enforcement officers will be in the expected delivery . . . [s]imilarly, when a controlled delivery is not made to the place to be searched, such as when a defendant is required to pick up a package containing contraband at a post office, the warrant application must present additional facts establishing the contraband will be taken to the place designated for search.

*Id.* at 1203.

469. *Id.* at 1205.

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at 1207-08 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

tory search warrant was *United States v. Lora-Solano*,<sup>474</sup> where two defendants appealed convictions for possession with intent to distribute controlled substances.<sup>475</sup>

An informant agreed to perform a controlled delivery of narcotics to a residence in Salt Lake City, Utah,<sup>476</sup> but the warrant listed a deficient address.<sup>477</sup> On the evening of the delivery, though, agents watched several people from the actual house to be searched remove items from the informant's car and take them into the house.<sup>478</sup> Agents then executed the warrant and recovered fifty pounds of marijuana and one kilogram of cocaine.<sup>479</sup>

In holding the warrant valid, the court began its discussion by stating:

An anticipatory search warrant, such as the warrant in this case, is valid "when the warrant application indicates there will be a government-controlled delivery of contraband to the place to be searched, probable cause for a search will be established . . . and provided the warrant's execution is conditioned on the contraband's delivery to, or receipt at, the designated place."<sup>480</sup>

The court then held that "[b]y adequately stating the conditions precedent to the warrant's execution (particularly the cooperation of the informant) in the affidavit, the warrant is valid despite the lack of a physical description of the premises."<sup>481</sup> The court next clarified that "adequately" did not mean "explicitly:"

The references in the warrant to the controlled delivery of drugs may not strictly be conditions precedent to the execution of the warrant, but we can still look at the warrant as a whole and see that the warrant (and the supporting affidavit) make extensive reference to expected drug sale.<sup>482</sup>

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474. 330 F.3d 1288 (10th Cir. 2003).

475. *Id.* at 1290. The defendants argued (among other things) that the warrant lacked particularity since it listed the wrong address and did not physically describe the house, and that the supporting affidavit "incorrectly alleged that a conversation between the police informant and Mr. Cortez-Cruz took place and was recorded." *Id.* at 1293. The discussion here will be limited to the "anticipatory" aspects of the warrant.

476. *Id.* at 1291. One of the defendants, Nicholas Cortez Cruz, owned the house, and the other, Jose Juan Lora-Solano, was renting a room. *Id.*

477. *Id.* The warrant listed the address as "2021 Camelot Way" but the correct address was "2051 Camelot Way." *Id.*

478. *Id.*

479. *Id.*

480. *Id.* at 1292 (quoting *United States v. Rowland*, 145 F.3d 1194, 1202 (10th Cir. 1998)).

481. *Id.* at 1292-93 (citing *United States v. Hugoboom*, 112 F.3d 1081 (10th Cir. 1997)). The court stated, "the probable cause requirement is satisfied by reference to a controlled delivery of contraband in the supporting affidavit." *Lora-Solano*, 330 F.3d at 1292.

482. *Lora-Solano*, 330 F.3d at 1294.

The most recent Tenth Circuit case to deal with an anticipatory warrant was *United States v. Hernandez-Rodriguez*.<sup>483</sup> There, a narcotics dog in Denver, Colorado, “alerted” federal agents to cocaine in a UPS package.<sup>484</sup> Inside the package, the agents found three kilograms of cocaine.<sup>485</sup>

In the subsequent application for an anticipatory warrant, the affidavit in support of the warrant stated that the search would be executed “when the delivery is made by [the undercover detective].”<sup>486</sup> The agents then made the delivery and executed the warrant, seizing the package, “two plastic bags of cocaine,” and more than two pounds of methamphetamine.<sup>487</sup> The defendant was sentenced to 235 months in prison.<sup>488</sup>

The defendant’s two primary points on appeal were that neither the warrant nor affidavit sufficiently described the triggering event, and that the affidavit describing the triggering event was not “attached to the warrant at the time it was executed.”<sup>489</sup> The court framed the issue as whether the description of the triggering event was sufficiently described, “and whether that description was required to appear on the face of the warrant or in papers physically attached to the warrant.”<sup>490</sup>

First, the court held that the affidavit did sufficiently describe the triggering event as it stated that the warrant would be executed “when delivery is made by [the undercover detective],”<sup>491</sup> and that this condition, read “[a]s a matter of common usage,” could be construed only to mean that the “package containing dangerous contraband” had to be taken into the place to be searched, and not merely left “on the doorstep.”<sup>492</sup> The “‘reference to a controlled delivery of contraband in the supporting affidavit’” also satisfied the probable cause requirement.<sup>493</sup>

Second, the court held Tenth Circuit jurisprudence “explicitly” rejected the notion that an anticipatory warrant needed to include on its face the condition precedent, and refused to adopt the Ninth Circuit’s requirement that the conditions precedent must be stated either in the warrant or in the affidavit that is actually attached to the warrant.<sup>494</sup> The

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483. 352 F.3d 1325 (10th Cir. 2003).

484. *Id.* at 1327.

485. *Id.*

486. *Id.* (internal quotations omitted).

487. *Id.*

488. *Id.* at 1328.

489. *Id.*

490. *Id.* at 1330.

491. *Id.* at 1331-32.

492. *Id.* at 1332.

493. *Id.* (quoting *United States v. Lora-Solano*, 330 F.3d 1288, 1292 (10th Cir. 2003)).

494. *Id.*

facts that the affidavit in support of the warrant contained the condition precedent and that the warrant "incorporated [the affidavit] by reference" precluded any finding of a Fourth Amendment violation.<sup>495</sup>

### *Eleventh Circuit Court of Appeals*

The Eleventh Circuit first confronted anticipatory warrants in a footnote in *United States v. Nixon*.<sup>496</sup> Although not directly at issue in the case, the court noted that anticipatory warrants "are appropriate only where the contraband is on a 'sure course' to a known destination, such as through the mail."<sup>497</sup> Ten years later, in *United States v. Santa*,<sup>498</sup> the court recognized that it had addressed anticipatory warrants in a footnote, but stated that "[i]t is well settled, however, 'that no opinion can be considered as binding unless the case calls for its expression.'"<sup>499</sup> The court was thus free to reexamine the issue in *Santa*.

In *Santa*, DEA agents working with a confidential informant made plans to buy a large amount of heroin from the defendant at the defendant's apartment.<sup>500</sup> Agents knew ahead of time that the exchange was going to take place, but instead of securing an anticipatory warrant, the agents chose to allow the transaction to take place. Without a warrant, agents searched the apartment where the exchange took place, and then attempted to justify the search based on exigent circumstances.<sup>501</sup>

The court first held, like every other circuit, that anticipatory warrants are not *per se* unconstitutional.<sup>502</sup> As with any other warrant, "there must be a sufficient nexus between the contraband to be seized and the place to be searched before an anticipatory warrant can be issued."<sup>503</sup> A warrant affidavit must state not only that the government agent believes that a delivery of contraband is going to occur, but how he obtained that belief, the reliability of his sources, and what part the government will play in the delivery.<sup>504</sup>

Here, the DEA agents could have easily obtained a warrant but chose not to.<sup>505</sup> Thus, "in circumstances . . . where law enforcement agents have ample time and information to secure an anticipatory search warrant, lack of time to obtain a warrant *after* delivery of the contraband

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495. *Id.* at 1327, 1332.

496. 918 F.2d 895 (11th Cir. 1990).

497. *Id.* at 903 n.6.

498. 236 F.3d 662 (11th Cir. 2000).

499. *Id.* at 671 n.14 (citing *Indiviglio v. United States*, 249 F.2d 549, 561 (5th Cir. 1957)).

500. *Id.* at 664-65.

501. *Id.* at 666-67.

502. *Id.* at 673.

503. *Id.* (citing *United States v. Loy*, 191 F.3d 360, 365 (3d Cir. 1999)).

504. *Id.* (citing *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989)).

505. *Id.* at 673-74.

is insufficient to justify a warrantless search.”<sup>506</sup>

#### INTER-CIRCUIT NON-UNIFORMITY

While each circuit borrows (in varying degrees) from the others, the preceding survey illustrates the fact that inter-circuit non-uniformity is the general rule. Since non-uniformity is the rule, one consequence is that a citizen within the geographic confines of one circuit may receive more or less protection under the Fourth Amendment of the United States Constitution than the same citizen would receive for identical conduct in a different circuit. While there are some aspects of the law that undoubtedly are best served on a more regional basis, protection under the Federal Constitution is not one of them.

Every circuit demands that probable cause exist for issuance of anticipatory search warrants, but the similarities end there. The various circuits’ jurisprudence is patchwork. Courts approve aspects of other circuits’ rulings that they endorse while disavowing other aspects they disagree with.<sup>507</sup> Some circuits, for example, demand that for an anticipatory search warrant to be valid, the contraband must be on a “sure course” to the place to be searched.<sup>508</sup> Other circuits discuss “sure

506. *Id.* at 674.

507. *See, e.g.*, *United States v. Leidner*, 99 F.3d 1423, 1427 (7th Cir. 1996) (in discussing the constitutionality of a warrant, “we do not believe that an anticipatory search warrant’s constitutionality is doomed by the absence of such language even though other circuit courts in reviewing similar challenges to anticipatory warrants have significantly focused on the presence or absence of such conditioning language”); *United States v. Vesikuru*, 314 F.3d 1116, 1119, 1120 n.3 (9th Cir. 2002) (citing *United States v. Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998), for the proposition that “[i]f the triggering event does not occur, probable cause to search is lacking,” while later stating that “[o]ther circuits have concluded that an anticipatory search warrant is valid even if the condition precedent is not stated on the face of the warrant,” but “[t]he rule in our Circuit . . . is that the affidavit must accompany the warrant and be incorporated by reference in order to be considered in conjunction with the warrant.”

508. *See United States v. Ricciardelli*, 998 F.2d 8, 13 (1st Cir. 1993) (“[w]e adopt the ‘sure and irreversible course’ standard as a means of judging the validity of anticipatory warrants”); *United States v. Ruddell*, 71 F.3d 331, 333 (9th Cir. 1995) (citing *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986)) (“[a]n affidavit in support of an anticipatory search warrant must show that the property sought is on a sure course to the destination targeted for the search”); *United States v. Vesikuru*, 314 F.3d 1116, 1122 (9th Cir. 2002) (quoting same); *United States v. Lawson*, 999 F.2d 985, 988 (6th Cir. 1993) (“[*United States v.*] *Rey* may be read to stand for the proposition that a warrant to search an address may be based solely on the fact that a package containing illegal substances is on a ‘sure course’ to a destination (like the mail)”); *United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988) (citing *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988) (internal quotations omitted) (an anticipatory search warrant for child pornography was valid “where the contraband to be seized is on a sure course to its destination, as in the mail”). The court in *Dornhofer*, however, also stated that the “sure course” standard was a “requirement” demanded by *Goodwin*. *Dornhofer*, 859 F.2d at 1198. *See also United States v. Dennis*, 115 F.3d 524, 530-31 (7th Cir. 1997) (stating that an example of a “sufficient nexus between the parcel and place to be searched” would be showing that contraband was on a “sure course” to the search destination, although in the same case, the court referred to the sure course standard as a

course” as a factor in determining the validity of an anticipatory search warrant, while not explicitly adopting it as the standard.<sup>509</sup> Circuits also differ on whether, and to what extent, conditions precedent (or “triggering events”) must be included (or incorporated) in the face of an anticipatory search warrant.<sup>510</sup>

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“requirement”); *United States v. Brack*, 188 F.3d 748, 757 (7th Cir. 1999) (citing *Dennis*, 115 F.3d at 528, 530) (stating “that the contraband be on a ‘sure course’ to the location to be searched” is a “requirement[ ] . . . because ‘warrants conditioned on future events present some potential for abuse’”). The *Brack* court, however, later stated that “[i]t is unclear how, or whether, the heightened ‘sure course’ requirement applies to anticipatory warrants outside the controlled delivery context” (quoting *United States v. Rowland*, 145 F.3d 1194, 1203 n.3 (10th Cir. 1998)).

509. See *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989) (“a wide variety of state and federal courts have upheld the anticipatory search warrant against constitutional challenge at least where the contraband is on a sure course to its destination”) (internal quotations omitted); see also *United States v. Wylie*, 919 F.2d 969, 974-76 (5th Cir. 1990) (upholding “the issuance by a magistrate of an anticipatory search warrant that authorizes the search of premises when it is known that contraband is on a sure course to its destination,” although the contraband had been delivered to the place to be searched before the search warrant was issued); *United States v. Rowland*, 145 F.3d 1194, 1204 n.3 (10th Cir. 1998) (stating that “[t]he sure course standard functions as a proxy for the actual presence of the contraband at the locus to be searched,” but deciding that the court “need not further determine whether the more stringent ‘sure course’ requirement is a necessary prerequisite to validity for all anticipatory warrants”). See also *United States v. Santa*, 236 F.3d 662, 672 n.14 (11th Cir. 2000). In *Santa*, the Eleventh Circuit recognized that the court “addressed the issue [of anticipatory search warrants] in a footnote, stating that ‘we note that [anticipatory search] warrants are appropriate only where the contraband is on a ‘sure course’ to a known destination such as through the mail.’” (citing *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990)). The court continued that “[i]t is well settled, however, that no opinion can be considered as binding authority unless the case calls for its expression.” (citation omitted). The court, however, did not subsequently rule on the issue expressly.

510. See generally Brett R. Hamm, *Note: United States v. Hotal: Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants*, 1999 BYU L. REV. 1005 (1999); see also *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993) (“contraband must be on a sure and irreversible course to its destination, and a future search of the destination must be made expressly contingent upon the contraband’s arrival there”); *United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (“a warrant must clearly say when it takes effect,” and “courts have required that the conditions upon which anticipatory warrants become effective be ‘explicit, clear, and narrowly drawn’”); *United States v. Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995) (anticipatory search warrant “valid even though it does not state on its face the conditions precedent for its execution, when, (1) ‘clear, explicit, and narrowly drawn’ conditions for the execution of the warrant are contained in the affidavit that applies for the warrant application, and (2) those conditions are actually satisfied before the warrant is executed”); *United States v. Loy*, 191 F.3d 360, 364 (3d Cir. 1999) (anticipatory search warrants “which meet the probable cause requirement and specifically identify the triggering event are not per se unconstitutional”); *United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) (it is “preferable” that an anticipatory warrant specify that it be executed only after controlled delivery occurs, but “silence on this point does not render it void”); see also *United States v. Ware*, 338 F.3d 476, 482 (6th Cir. 2003) (warrant valid as an anticipatory warrant where it allows for an immediate search so long as “an objectively reasonable officer would likely have concluded that the warrant legally authorized a search of the apartment only upon the controlled delivery of the [contraband]”); *United States v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997) (anticipatory warrant need not state conditions precedent to its execution as long as affidavit contains “‘clear, explicit and narrowly drawn’ conditions and the executing officers actually satisfy those conditions before executing the warrant,” and if the

In *Hernandez-Rodriguez*,<sup>511</sup> for example, the Tenth Circuit declined to adopt the Ninth Circuit rule concerning conditions precedent despite the “urg[ing]” from the defendant’s counsel.<sup>512</sup> The rule for the Ninth Circuit is that an anticipatory warrant must explicitly state the conditions precedent either in the warrant or, alternatively, state in the affidavit, which must be attached to the warrant.<sup>513</sup> After articulating the Tenth Circuit rule, the court found that its “jurisprudence is in accord with that of the Second, Sixth, Seventh, and Eighth Circuits.”<sup>514</sup> The court continued, stating that the Tenth Circuit, in the “good company” of those other circuits, had “no reason to depart from our earlier cases, even if we were free to do so, which we are not. . . . Absent an intervening Supreme Court or en banc decision justifying such action, we lack the power to overrule our own precedent.”<sup>515</sup>

This statement is indicative of the need for Supreme Court action. The various circuits, even if willing to adopt uniform jurisprudence, would find it to be a slow and difficult (if not impossible) process. The circuits already have set out on different courses, and are for the most part content with the status quo. They are, as the Tenth Circuit in *Hernandez-Rodriguez* recognized, to a large degree without the power or motivation to alter their own precedent.

In contrast to the preceding examples of inter-circuit non-uniformity, *United States v. Miggins* provides an excellent example of intra-circuit non-uniformity. In upholding the validity of the search and war-

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officers actually satisfy those conditions precedent the affidavit does not need to be attached to the warrant); *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) (“even if [the] affidavit was not incorporated into the warrant, it contained a representation to the issuing judge that the warrant would not be executed until the package was delivered and accepted. In such circumstances, we do not believe the Constitution requires that this limitation be written into the warrant itself”); *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998) (“in order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event”); *United States v. Vesikuru*, 314 F.3d 1116, 1120 n.3 (9th Cir. 2002) (“[t]he rule in our Circuit . . . is that the affidavit must accompany the warrant and be incorporated by reference in order to be considered in conjunction with the warrant”); *United States v. Rowland*, 145 F.3d 1194, 1202 n.2 (10th Cir. 1998) (“there is no Fourth Amendment violation requiring suppression when the conditions for execution of the anticipatory warrant are stated in the affidavit that solicits the warrant, accepted by the issuing magistrate, and actually satisfied in the execution of the warrant”) (internal quotations omitted); see also *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1331-32 (10th Cir. 2003) (internal quotations omitted) (“it is the preferred practice for the anticipatory warrant to itself set out, or incorporate by reference, the conditions for the warrant’s execution, but . . . there is no Fourth Amendment violation when the conditions are set forth in the affidavit that solicits the warrant”).

511. See *supra* n.482 and accompanying text.

512. *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1332 (10th Cir. 2003).

513. *Id.* (citing *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998)).

514. *Id.*

515. *Id.* (internal quotations omitted).



rant upon which the searched was based, the *Miggins* court cited authority from a variety of circuits, including its own.<sup>516</sup> Some of the cited precedent, however, is perhaps misapplied, and the result is the announcement of a new Sixth Circuit rule for the validity of anticipatory search warrants.

The affidavit for the search warrant for Moore's home stated that "[w]hen [the contraband] is delivered to [Moore's] address and possession of the package is taken by someone inside [Moore's residence], as is anticipated, then and only then will the search warrant be executed."<sup>517</sup> The court, however, held that this triggering event was satisfied when someone accepted the package outside of the house because they *may* have been inside of the house prior to accepting the package.<sup>518</sup> The court cited the First Circuit's *Gendron* decision in support.<sup>519</sup> The court also held the warrant to be satisfactory despite the absence of the triggering event, as "the affidavit attached in support of the warrant specified the triggering event."<sup>520</sup>

The court further held in its determination that the triggering event was "consistent with this Court's reasoning and result in *Jackson*."<sup>521</sup> In *Jackson*, execution of a search warrant could occur "if, and only if, the package [was] accepted and taken inside the subject premises."<sup>522</sup> Agents delivered the contraband and as they executed the warrant, they discovered the defendant fleeing through the backyard.<sup>523</sup> The court held that "the search warrant was not invalid simply because it failed to require the package to remain on the premises."<sup>524</sup>

While the *Miggins* court's recitation of the *Jackson* rule is valid Sixth Circuit jurisprudence, it is perhaps misapplied. The obvious difference is that the defendant in *Jackson* actually took the contraband *into* the place to be searched. In *Miggins*, the contraband that was the subject of the controlled delivery never saw the inside of the defendant's home.

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516. See generally *United States v. Miggins*, 302 F.3d 384 (6th Cir. 2002).

517. *Id.* at 389 (first alteration in original).

518. *Id.* at 395.

519. *Id.* (citing *United States v. Gendron*, 18 F.3d 955, 966 (1st Cir. 1994) (alteration in original) (warrants and their supporting documents are to be read "not 'hypertechnical[ly],' but in a 'commonsense' fashion").

520. *Id.* Note that this would not be sufficient under the Ninth Circuit standard. See *Hotal*, 143 F.3d at 1227 ("[i]n order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event"); *Vesikuru*, 314 F.3d at 1120 n.3 ("[t]he rule in our Circuit . . . is that the affidavit must accompany the warrant and be incorporated by reference in order to be considered in conjunction with the warrant").

521. *Id.* at 396.

522. *Id.* (citing *United States v. Jackson*, 55 F.3d 1219, 1221 (6th Cir. 1995)).

523. *Id.* (citing *Jackson*, 55 F.3d at 1221).

524. *Id.* (citing *Jackson*, 55 F.3d at 1224).

The court explains away this difference by the fact that “the package was taken by someone who had been inside the premises just prior to the delivery of the package.”<sup>525</sup>

While purportedly basing its decision on “the reasoning and result in *Jackson*,” the court actually announced a new rule and standard for the validity of anticipatory search warrants. Under the Sixth Circuit’s new rule, an anticipatory search warrant is valid if “there [is] sufficient contact between the parcel that [is] addressed to [a defendant’s] residence and [someone] who [is] identified with this residence and who sign[s] for the parcel.”<sup>526</sup>

### CONCLUSION

Anticipatory search warrants have been and will continue to serve as an effective instrument for law enforcement. They are valuable constitutional devices. The importance of these warrants, coupled with the variety of approaches among the circuits, however, signals that the jurisprudence in this area of the law should be unified by the definitive authority on Fourth Amendment jurisprudence, the United States Supreme Court. The inability and unwillingness of the circuits to adopt uniform jurisprudence and the Sixth Circuit’s recent misapplication of its own law in *Miggins* are indicative of the need for uniformity.

While some aspects of the law are best left for a more regional application, treatment under the Fourth Amendment of the Federal Constitution is not one of them, and until the Supreme Court establishes a uniform rule, the circuits will continue to diverge not only from one another, but even from their own jurisprudence, as the Sixth Circuit did in *Miggins*. The result will be tangible to citizens residing in the several jurisdictions when, for example, conduct occurring in one jurisdiction is treated differently than identical conduct that occurred in another jurisdiction. The issue is ripe for Supreme Court adjudication, and the need for uniformity is plain – every citizen, no matter where situated, deserves equality of treatment under the Fourth Amendment.

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525. *Id.* The very fact that the person who accepted the package actually went inside Moore’s home was also contested. *See id.*

526. *Id.* at 397.

\* J.D. 2003.