

No. _____

In The Supreme Court of the United States

TERM, 2018

DAVID JAMES MATTHEW
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

**On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- (1) WHETHER AGENT WALDO'S INITIAL WARRANTLESS ENTRY, WITHOUT KNOCKING OR RINGING THE DOORBELL, INTO THE ENCLOSED "SCREENED FRONT PATIO" OF MATTHEW'S RESIDENCE VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THIS COURT'S DECISION IN *FLORIDA V. JARDINES* AND THE REQUIREMENTS OF THE ANTICIPATORY AND CONDITIONAL SEARCH WARRANT
- (2) WHETHER AGENT WALDO'S INITIAL WARRANTLESS ENTRY, WITHOUT KNOCKING OR RINGING THE DOORBELL, INTO THE ENCLOSED "SCREENED FRONT PATIO" OF MATTHEW'S RESIDENCE VIOLATED THE TRIGGERING CONDITIONS OF DELIVERY AND ACCEPTANCE CONTAINED IN THE ANTICIPATORY AND CONDITIONAL SEARCH WARRANT DID NOT OCCUR AND THEREFORE VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THIS COURT'S DECISION IN *UNITED STATES V. GRUBBS*

PARTIES TO THE PROCEEDING

Petitioner is DAVID JAMES MATTHEW (Matthew). He is the Defendant in the District Court and Appellant in the Court of Appeals.

Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

David James Matthew respectfully petitions for a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals.

OPINION BELOW

The Ninth Circuit Court of Appeals affirmed Matthew's conviction and rejected his substantive legal challenges but reversed and remanded for re-sentencing related to his supervised release conditions. A copy of Matthew's Opinion is attached as Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals entered its decision on February 20, 2018, rejecting Matthew's substantive legal arguments; however, it remanded his case for re-sentencing. *See, Appendix A.* Matthew was re-sentenced on August 3, 2018. The District Court entered its Judgment on August 3, 2018. His Petition is timely filed. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment is reprinted in an Appendix to this Petition. *See, Appendix B.*

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STATEMENT OF THE CASE

I. Proceedings Below

A. The District Court

Matthew was charged in a single Count Indictment on July 17, 2015, with being a Felon in Possession of Firearms and Ammunition in violation of 18 U.S.C. 922(g)(1). He appeared for his Arraignment and plead not guilty. He was detained pending trial.

On January 4, 2016, Matthew filed a Motion to Suppress Evidence. A hearing was held on his Motion on January 22, 2016, and the District Court denied his Motion on February 3, 2016.

On March 21 and 22, 2016, Matthew appeared for a jury trial in Billings, Montana. At the conclusion of the trial, the jury found Matthew guilty. He continued to be held pending sentencing.

On November 7, 2016, Matthew appeared for his sentencing. Matthew was sentenced to thirty-seven (37) months of imprisonment followed by three (3) years of supervised release.

On November 9, 2016, Matthew timely filed his Notice of Appeal.

On February 20, 2018, the Ninth Circuit Court of Appeals issued its Memorandum Opinion rejecting Matthew's substantive arguments, but reversed and remanded for re-sentencing on his supervised release conditions

On August 3, 2018, Matthew was re-sentenced. The district court imposed new conditions of supervised release. He did not file a Notice of Appeal, as he has already appealed the substantive rulings in this matter and the Ninth Circuit Court of Appeals had already rejected them in its February 20, 2018 Memorandum Opinion. This Petition is timely filed.

B. The Court of Appeals

In its Memorandum Opinion, the Ninth Circuit Court of Appeals rejected Matthew's legal challenges, stating in relevant part as follows:

Waldo did not violate the Fourth Amendment by entering the screened front patio in order to deliver the package containing marijuana. As Matthew recognizes, the front patio area was part of the curtilage of the home. *See Florida v. Jardines*, 569 U.S. 1, 7 (2013) (stating that the "front porch is the classic exemplar" of curtilage). The curtilage is considered to be part of the home for the purposes of the Fourth Amendment inquiry. *Id.* at 6. There is, however, an implicit license for police officers to enter the curtilage, provided that they do so in a manner that complies with the customs of the community. *Id.* at 8 (This implicit license typically permits the visitor to approach the home by the front path, knock, wait briefly to be received, and then (absent invitation to linger longer) leave"); *see also United States v. Perea-Ray*, 680 F.3d 1179, 1188 (9th Cir. 2012).

In this case, Waldo's actions were those that would be typical of any neighbor trying to deliver a package. He approached the screened patio and finding it unlocked, entered the patio to knock on the door leading from the patio into the rest of the house. There were opened packages on a table in the patio-area, and Waldo believed that if he were to knock on the patio door, no one would hear him. Waldo reasonably entered the unlocked patio pursuant to an implicit license and did not violate the Fourth Amendment by doing so.

Additionally, the terms of the anticipatory search warrant were satisfied. Anticipatory search warrants are based upon the occurrence of a "triggering condition," which provides the probable cause needed for the search warrant

to be valid. *United States v. Grubbs*, 547 U.S. 90, 94 (2006). We interpret triggering conditions in a common-sense manner rather than adopting a hypertechnical and narrow reading of the warrant language.” *United States v. Vesikuru*, 314 F. 3d 1116, 1123 (9th Cir. 2002).

The anticipatory search warrant required Matthew to accept the package at his residence described in the search warrant and then to re-enter the residence.

Matthew argues that because the package was found on the front porch, the requirement that Matthew “re-enter” his residence with the package was not met. The warrant’s description of the premises, however, expressly includes the “screened front patio.” Without question, the front patio was part of the residence for the purposes of the search warrant. As Matthew never left his residence, but rather accepted the package while in the patio, it would be nonsensical to require that he “re-enter” his residence. *See id.* The terms of the anticipatory search warrant were satisfied.

See Appendix A.

C. Bail Status of Petitioner

Matthew was released from Bureau of Prison custody on January 31, 2018 and is currently serving his three (3) years of supervised release.

REASON FOR GRANTING THE WRIT

I. Relevant Facts

On the morning of February 20, 2015, Andy Keith (Keith), a business manager for the United Parcel Service (UPS), was supervising his employees when he discovered a “damaged and distressed” package. TR, Pg. 5, L. 22. The package, a brown cardboard box addressed to “David” at an address in Hardin, Montana, was torn open on the flap and crushed. TR, Pg. 6, L. 4-5. The policy at UPS for a

“damaged and distressed” package is to verify its contents. TR, Pg. 6, L. 6-13. Consistent with that policy, Keith opened the package and took out its contents noticing that it contained what he believed to be marijuana. TR, Pg.7, L. 10-25. He placed the suspected marijuana back in the brown cardboard box and contacted his security supervisor, John Sullivan (Sullivan). TR, Pg. 7, L. 25 - Pg. 8, L. 1; Pg. 9, L. 4-6.

Keith informed Sullivan that he inspected a “damaged and distressed” package that contained what he believed to be marijuana. TR, Pg. 21, L. 21-23. Sullivan took the package to his office so he could contact the authorities. TR, Pg. 22, L. 2-3. He also photographed the package and sealed it to protect it and to keep it from being contaminated or lost. TR, Pg. 24-25.

After Sullivan photographed the package, he contacted Jeremy Waldo (Agent Waldo) a criminal investigator for the Montana Department of Justice, Division of Criminal Investigation. TR, Pg. 25, L. 18-19; TR, Pg. 52, L. 6-8. Agent Waldo went directly to Sullivan’s office and took possession of the package. TR, Pg. 54, L. 13-19.

While in Sullivan’s office, Agent Waldo spoke with him about who the individual identified on the package as “David” might be. TR, Pg. 56, L. 4-20. In response to Agent Waldo’s questions regarding who “David” might be, Sullivan looked into some UPS records and spoke with some employees. TR, Pg. 56, L. 16-

20. Sullivan explained to Agent Waldo that he believed the “David” on the package was David Matthew based on prior shipments to the address identified on the package. *Id.* Sullivan explained that Matthew received one to two packages a month from California since September 2014. *Id.* Agent Waldo noted the shipper on the package was an “Anthony” from Fremont, California. *Id.* Agent Waldo then explained to Sullivan he would try to conduct a controlled delivery of the package on Matthew. TR, Pg. 57, L. 14-16. Agent Waldo went back to his office and secured the package in his evidence vault. TR, Pg. 57, L. 16-19.

After looking at his schedule, Agent Waldo realized he could not conduct an immediate controlled delivery. TR, Pg. 58, L. 2-20. He contacted Sullivan and explained that he needed UPS to buy him more time. *Id.* Agent Waldo asked Sullivan to change the UPS records to reflect that the package had been delivered. *Id.* Sullivan complied and contacted Agent Waldo, on February 24, 2015, to advise him that Matthew confronted one of the delivery drivers in Hardin about the package, and was confrontational until the driver let him read an online tracking form showing that the package had been delivered. *Id.*

Six days later, on March 2, 2015, after Agent Waldo’s schedule cleared, he obtained a search warrant for the package and executed it on the package. TR, Pg. 57, L. 21- 23. When he opened the package, it contained what Keith at UPS observed on February 20, 2015, *i.e.*, marijuana. *Id.*

When Agent Waldo wrote the search warrant application for the package, he did not place any information in the application about Matthew having status as a medical marijuana patient or provider. TR, Pg. 59, L. 8-21. However, on March 3, 2015, after Agent Waldo opened the package he learned that Matthew was a medical marijuana patient. TR, Pg. 60, L. 19-21.

On March 4, 2015, Agent Waldo presented a second search warrant application to a Montana State District Court Judge for the issuance of an anticipatory and conditional search warrant for Matthew's residence. The events that triggered execution of the search warrant on Matthew's residence are described in the search warrant as follows:

YOU ARE HEREBY ORDERED to serve this warrant, if Matthew is occupying the premises described in the warrant as a 'light blue in color, two story house, with white trim and *a screened Front patio* located at 119 6th Street West, Hardin, Montana, 59034'[,] and *if Matthew accepts the package at his residence and then re-enters his residence after receiving the package* and during the afternoon hours of March 4th 2015, you may then search the above-described premises

Once he had his warrant, Agent Waldo executed the original plan of February 20, 2015. On the afternoon of March 4, 2015, Agent Waldo re-packaged the contents of the original shipment and placed the marijuana in a new cardboard box. He went to Matthew's residence, walked up the steps on the front of the residence, opened the front screen door to Matthew's residence, and entered the enclosed "screened front patio" that is attached to the residence. TR, Pg. 64; L. 21-

25; Pg. 65; L.1-2.

Below is a photograph of Matthew's residence:



The screen door had a lock on it but was not locked when Agent Waldo entered.

TR, Pg. 90, L. 7-8. Agent Waldo walked through the "screened front patio" to the interior door of Matthew's residence. TR, Pg. 64, L. 21-25; Pg. 65, L. 1-2. It is uncontested that he did not knock. He did not ring the doorbell. Instead, he opened the screen door and entered Matthew's home, i.e., his "screened front patio."

Agent Waldo then stood inside the enclosed "screened front patio" at the interior door and knocked. TR, Pg. 65, L. 2-3. A short while after he knocked on

the interior door Matthew answered. TR, Pg. 65, L. 5-7. When Matthew opened the interior door he was in his living room, standing at the threshold of the interior doorway. TR, Pg. 65, L. 19-20. Agent Waldo was standing directly in front of him inside the enclosed “screened front patio.” TR, Pg. 65. L. 22; ER 90.

Agent Waldo lied to Matthew and said he was a resident in his neighborhood and the package was mistakenly delivered to his house. TR, Pg. 66, L. 16-18. Agent Waldo further explained he had been working out of town and was just being a good neighbor and delivering the mistakenly delivered package on his return. TR, Pg. 66, L.18-19. Matthew did not buy Agent Waldo’s ruse. When Matthew opened the door, Agent Waldo asked him “are you David?” TR, Pg. 67, L. 1. Matthew told Agent Waldo, “No, I’m not.” TR, Pg. 67, L. 2-3. Agent Waldo, surprised by Matthew’s denial then said, “okay well, I have this package . . . is your address 1196 Street West?” TR, Pg. 67, L. 18-22. To which Matthew responded, “yes that’s my address.” *Id.*

Matthew did not accept the package at this point, nor did he take the package from Agent Waldo. In response to Matthew’s denial that he was “David,” Agent Waldo brought the package around so Matthew could see the shipping label on top of the package. TR, Pg. 68, L. 1-4. At that point, Matthew stepped out of his living room and into the enclosed “screened front patio” where Agent Waldo had entered and was standing. *Id.* Agent Waldo then explained how he handed the package to

Matthew:

And I had just kind of handed the box to him so he could see. Looked like he was kind of going that direction, anyways. Like he needed to see it closer, so I handed it to him, and he was reading the label.

TR, Pg. 68; L. 6-9.

Agent Waldo further explained how he handed the package to Matthew: I handed him the box, and he then just held it in front of him and read it and twisted it.

TR, Pg. 68; L.23-24.

Agent Waldo then advised Matthew that he was double parked and needed to leave, and at that point Agent Waldo stated that Matthew said "I'm David Matthew--Matthews." TR, Pg. 70; L. 3-7. Notably, there was no last name on the package, only the name "David." Agent Waldo and Matthew then exchanged pleasantries and Matthew said he would return the favor and deliver the package if one of Agent Waldo's packages ever showed up. Agent Waldo exited the "screened front patio" and left. TR, Pg. 70, L. 10-14. He never observed Matthew re-enter his living room with the package. TR 75, Pg. 89; L. 5-7. Matthew in fact never re-entered his living room with the package. When asked about standing inside the enclosed "screened front patio" and handing the package to Matthew, Agent Waldo admitted the following:

... He stayed within the -- the front -- the screened-in area, front porch of the residence. *He would have an expectation of privacy in there. It was under the roof of his home. I would consider it to be a part of the residence. It was within the residence.*

TR, Pg. 90; L. 21-25 (emphasis added).

Agent Waldo further admitted that during the execution of the search warrant the package he handed Matthew was unopened and not located inside the home. TR, Pg. 89. Instead, it was recovered in the enclosed "screened front patio"

where Agent Waldo entered and handed it to Matthew, just left of the interior door and right of the table. TR, Pg. 70; L. 16-22.

Agent Waldo believed his handing the package to Matthew while they both stood in the enclosed “screened front patio” satisfied the requirements of the anticipatory and conditional search warrant. He therefore returned within a short time with several law enforcement officers and executed the search warrant.

While searching Matthew’s residence pursuant to the anticipatory and conditional search warrant, Big Horn County Undersheriff Bart Elliott (Deputy Elliott) found firearms and ammunition located in a closet in the upstairs hallway of Matthew’s home. Specifically, Deputy Elliot found and seized a Ruger, model P345, .45 caliber semi-automatic pistol (S/N 664-83218) loaded with one round in the chamber and rounds in the magazine with a loaded spare magazine. Agents also recovered an HS Products (IM Metal) Springfield Armory, model XD-9, 9 mm semi-automatic pistol (S/N US822971), which was loaded with one round in the chamber and 2 loaded magazines. In addition to the two handguns located in the closet, agents located multiple rounds of ammunition of various calibers, including .45, 9 mm, and .38 caliber rounds in an upstairs attic.

Because Matthew has a previous felony conviction out of the State of California it was illegal for him to possess a firearm or ammunition. Therefore, the execution of the search warrant resulted in the filing of a Federal Indictment

against Matthew alleging he was a felon in possession of firearms and ammunition.

Matthew asserted he did not knowingly possess the firearms and ammunition. He explained that the firearms and ammunition actually belonged to his ex-wife, Julie Ann Rodriguez, and that she was awarded the firearms in their divorce. He explained that she simply had not yet removed the firearms from the marital home.

Matthew's ex-wife adamantly denied his explanation. Instead, she asserted that Matthew actually purchased one of the firearms and placed it in her name, knew of the presence of the firearms in the home and affirmatively refused to give the firearms to her when she packed her belongings to leave.

Agent Waldo and Deputy Elliot explained that during the execution of the search warrant the firearms were discovered in a hall closet. Agent Waldo explained that Matthew had roommates and a lock on his bedroom door. The two firearms were in a hall closet down the hall from Matthew's locked bedroom. They were at the bottom of the hall closet inside a duffel bag in their individual cases. They were loaded. He also explained that the ammunition was located in a cubbyhole in the attic of Matthew's home.

Matthew explained that the firearms and ammunition were not located in his locked bedroom and that the items in the hall closet belonged to his ex-wife. Again, Matthew's ex-wife denied his explanation and asserted the items in the hall

closet actually belonged to him.

Merle Johns (Johns), a neighbor of Matthew, explained that he roofed two homes belonging to Matthew. He stated that Matthew offered to pay him in part for his work by giving him a .45 caliber pistol for credit on the invoice. Matthew denied this and stated that he had never offered to sell the firearm, nor any weapon to Johns or that he owned any other firearms. TR, Pg. 317, L. 21-22; Pg. 337, L. 22-24; Pg. 306, L. 13-16; Pg. 331, L. 5-9. In response to Matthew's denials related to selling any gun to Johns, Johns explained that he had actually purchased a 22 rifle from Matthew previously. *Id.* Matthew explained that Johns and his son-in-law were in a dispute over rent, and Matthew believed that Johns had co-signed to pay the rent amount due.

Philip Swain, an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, explained that the firearms and ammunition arrived in Montana via interstate commerce.

ARGUMENT

A. Agent Waldo's Initial Warrantless Entry Into the Enclosed "Screened Front Patio" of Matthew's Residence Violated the Fourth Amendment to the United States Constitution, this Court's Decision in *Florida v. Jardines* and the Requirements of the Anticipatory and Conditional Search Warrant.

In this case, the nature of Matthew's privacy interest is at its "zenith," because Agent Waldo's actions involve a search of his home, and if Agent

Waldo's initial entry is determined to have been a warrantless search it is "presumptively unreasonable." *See Payton v. New York*, 445 U.S. 573, 586 (1980); *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

In *Payton*, this Court drew a bright line at the physical entrance to the home, stating:

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that 'at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Id. at 589-90 (citation omitted).

The search warrant at issue here states in relevant part as follows:

YOU ARE HEREBY ORDERED to serve this warrant, if Matthew is occupying the premises described in the warrant as a 'light blue in color, two story house, with white trim and a screened Front patio located at 119 6th Street West, Hardin, Montana, 59034'[,] and if Matthew accepts the package at his residence and then re-enters his residence after receiving the package and during the afternoon hours of March 4th 2015, you may then search the above-described premises

The District Court reasoned as follows:

... the search warrant specifically listed the front-porch as part of the residence...the fact that Matthew never left his residence when he accepted the package essentially nullified the requirement that he re-enter his residence.

The Ninth Circuit reasoned as follows:

In this case, Waldo's actions were those that would be typical of any neighbor trying to deliver a package. He approached the screened patio and finding it unlocked, entered the patio to knock on the door leading from the patio into the rest of the house. There were opened packages on a table in the patio-area, and Waldo believed that if he were to knock on the patio door, no one would hear him. Waldo reasonably entered the unlocked patio pursuant to an implicit license and did not violate the Fourth Amendment by doing so.

Additionally, the terms of the anticipatory search warrant were satisfied . . . The anticipatory search warrant required Matthew to accept the package at his residence described in the search warrant and then to re-enter the residence.

Matthew argues that because the package was found on the front porch, the requirement that Matthew "re-enter" his residence with the package was not met. The warrant's description of the premises, however, expressly includes the "screened front patio." Without question, the front patio was part of the residence for the purposes of the search warrant. As Matthew never left his residence, but rather accepted the package while in the patio, it would be nonsensical to require that he "re-enter" his residence. *See id.* The terms of the anticipatory search warrant were satisfied.

See Appendix A.

The search warrant limited where Agent Waldo could attempt delivery and acceptance of the package. The search warrant states that Matthew's residence, his home, includes "*a screened front patio.*" By definition then, Agent Waldo's initial warrantless entry into the enclosed "screened front patio" without the triggering

events of the search warrant *first* being satisfied violated the Fourth Amendment and the requirements of the anticipatory and conditional search warrant.

Agent Waldo could not enter Matthew's residence to satisfy the conditions of the anticipatory search warrant that required delivery and acceptance *before* entry into his residence was deemed lawful. Agent Waldo did the reverse of what was required by the plain and unambiguous language of the search warrant. Agent Waldo knew that he could not enter Matthew's residence without a search warrant, that is why he requested one in the first place. He entered Matthew's enclosed "*screened front patio*" with the intent of handing Matthew the package so that the conditions of delivery and acceptance required by the search warrant could be satisfied. He did so in violation of the Fourth Amendment.

Importantly, Agent Waldo knew the enclosed "*screened front patio*" was an area Matthew had an expectation of privacy in and could not be entered without the conditions of the warrant first being satisfied:

... He stayed within the -- the front -- the screened-in area, front porch of the residence. *He would have an expectation of privacy in there. It was under the roof of his home. I would consider it to be part of the residence. It was within the residence.*

TR 75, Pg. 90; L. 21-25 (emphasis added).

Agent Waldo also admitted that he entered the enclosed "*screened front patio*" without knocking or being allowed or being asked in. He admitted the screen door had a lock on it. He also admitted he handed the package to Matthew

while they both stood in the enclosed “screened front patio.” He did not knock on the screen door. He did not ring Matthews’ doorbell (which is customary in Matthews’ community).

Legally, it cannot be both ways. It is illogical to suggest that Agent Waldo satisfied the conditional language of the search warrant by handing the package to Matthew inside his residence, therefore Matthew did not have to re-enter his residence because he was already in it as defined by the search warrant. Agent Waldo entered Matthew’s residence *without* a warrant in the first place to hand him the package. This is the reverse of what is required by the Fourth Amendment and the search warrant.

A law enforcement officer cannot enter into a home without a warrant to satisfy the conditions of a conditional search warrant.

And this is exactly what the Ninth Circuit got wrong when it concluded that Agent Waldo’s entry into the “screened front patio” did not violate this Court’s reasoning in *Florida v. Jardines*, 569 U.S. 1 (2013).

In *Jardines* this Court addressed whether the use of a trained drug detection dog to sniff for narcotics on the front porch of a private home was a "search" within the meaning of the Fourth Amendment and therefore, without consent, required both probable cause and a search warrant. 569 U.S. 12. Justice Scalia reasoned that it was a search requiring probable cause and a search warrant. *Id.* In

discussing whether the officer's investigation was accomplished through an unlicensed physical intrusion he stated in relevant part as follows:

A license may be implied from the habits of the country . . . We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.

569 U.S. 1 at 8 (quotations and citations omitted).

Justice Scalia recognizes that Agent Waldo only had a license to knock on the front door to Matthew's "screened front patio" or to ring the doorbell and patiently wait for entry. He had no license to open that door, enter inside Matthew's residence and step upon the "screened front patio" with the intent to deliver the package. According to Justice Scalia's logic in *Jardines* Agent Waldo's license ended at the front door to Matthew's residence, which was the front door to his "screened front patio." Agent Waldo violated the Fourth Amendment by the very definition of Matthew's home in the conditional search warrant.

B. The Triggering Conditions of Delivery and Acceptance Contained in The Anticipatory and Conditional Search Warrant Did Not Occur, Therefore the Search Violated the Fourth Amendment To The United States Constitution and This Court's Decision in *United States V. Grubbs*.

Even if Agent Waldo could constitutionally enter the enclosed "screened

front patio" to satisfy the conditions of delivery and acceptance of the package,

Matthew asserts that the triggering events of delivery and re-entry into his residence did not occur.

Anticipatory warrants are not unconstitutional under the United States Constitution's Fourth Amendment provision that "no Warrants shall issue, but upon probable cause." *United States v. Grubbs*, 547 U.S. 90, 94-95 (2006); U.S. Const. Amend. IV.

An anticipatory warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time--a so-called triggering condition. . . . If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. *Id.* (internal citations and quotations omitted).

Because the execution of an anticipatory search warrant is conditioned upon the occurrence of triggering events, when those triggering events do not occur, probable cause to search is lacking. *Id.*

Here, there are two triggering events contained in the search warrant:

... if Matthew accepts the package at his residence and then re-enters his residence after receiving the package

First, the package had to be delivered to, and accepted by, Matthew. Second, Matthew had to re-enter his residence with the package after accepting the

package. If one or both of these triggering events did not occur, then the fruits of the search must be suppressed. *See, Grubbs*, 547 U.S. at 94-95.

Because the search warrant included the enclosed “screened front patio” as Matthew’s residence, the first condition in the search warrant was not satisfied. The condition of delivery and acceptance had to be satisfied *before* Agent Waldo could enter Matthew’s residence. Agent Waldo admitted he entered the enclosed “screened front patio” without a warrant and handed the package to Matthew in an effort to satisfy the delivery and acceptance conditions of the anticipatory and conditional search warrant. He had to first satisfy the delivery and acceptance of the package conditions of the search warrant because the package itself is the probable cause that allowed the anticipatory and conditional search warrant to be issued in the first place.

Agent Waldo could not satisfy the condition of delivery and acceptance by handing the package to Matthew because the act of Agent Waldo handing Matthew the package is not “acceptance” by Matthew.

Where the probable cause in the search warrant was the package itself, Agent Waldo could not satisfy the search warrant’s conditions by a warrantless entry into Matthew’s residence with the intent of handing the package, i.e. the probable cause, to Matthew.

In addition to not satisfying the delivery and acceptance conditions of the

search warrant *before* entering Matthew's residence, the package needed to be taken inside Matthew's residence by Matthew after it was delivered by Agent Waldo.

The Ninth Circuit's legal conclusion that the package did not have to enter the residence because Agent Waldo entered the residence to deliver the package is circular and contrary to the Fourth Amendment and the requirements of the search warrant and this Court's decision in *s*. A common sense reading of the language "re-enter his residence" can only be understood to mean that Matthew had to re-enter his residence *with* the package. The language is not necessary if all the search warrant required was delivery. The problem here is that Agent Waldo was already in Matthew's residence when he delivered the package. The fact that Matthew did not re-enter the interior door of his residence and return to his living room with the package not only reflects that he did not accept the package from Agent Waldo after Agent Waldo handed it to him, but also that the express condition of "re-entry" did not occur.

The Ninth Circuit legally erred in reasoning that because the search warrant described Matthew's residence to include the enclosed "screened front patio," that Matthew did not need to re-enter the interior door of his residence because he was already in his residence. Agent Waldo could not first enter Matthew's residence without a warrant, hand him the package, and then claim that the conditions of the

search warrant were satisfied because Matthew accepted delivery of the package in his residence. Agent Waldo's attempt to satisfy the conditions of the search warrant is backwards. Agent Waldo, under the Ninth Circuit's reasoning, could satisfy the conditional search warrant by entering Matthew's residence without a warrant, hand him the package and then assert that the conditions of the search warrant were satisfied because Matthew was in his residence. Even Agent Waldo understood he was where he should not have been because he admitted:

... He stayed within the -- the front -- the screened-in area, front porch of the residence. *He would have an expectation of privacy in there. It was under the roof of his home. I would consider it to be part of the residence. It was within the residence.*

TR, Pg. 90; L. 21-25 (*emphasis added*).

The triggering conditions of the anticipatory and conditional search warrant were not satisfied *before* Agent Waldo entered the enclosed "screened front patio." After the package was handed to Matthew by Agent Waldo, Matthew did not re-enter his residence with the package.

CONCLUSION

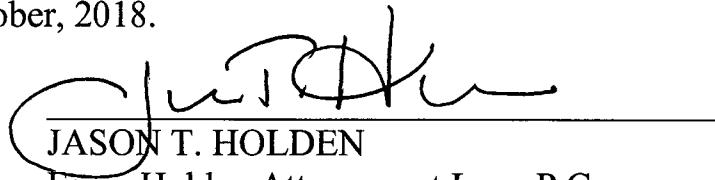
It is logically inconsistent to conclude that the enclosed "screened front patio" is included in the definition of Matthew's residence in the anticipatory and conditional search warrant at the same time recognizing that Agent Waldo first entered the enclosed "screened front patio" to hand the package to Matthew. Agent

Waldo's actions violated the Fourth Amendment and the requirements of the search warrant.

Even if Agent Waldo could enter Matthew's residence to deliver the package, the triggering events of delivery and re-entry did not occur. Agent Waldo handed Matthew the package. Once handed the package Matthew never re-entered his residence with the package. The conditions of the search warrant were not satisfied.

Accordingly, the Court should grant a Petition for Writ of Certiorari to examine the issues presented for review.

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