No. _____

In The

Supreme Court of the United States

BRYANT KAZUYOSHI IWAI,

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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE NINTH CIRCUIT MAJORITY OPINION AS A MATTER OF SOUND PUBLIC POLICY HAS (1) ADOPTED A RULE OF EXIGENT CIRCUMSTANCES TO ENTER A HOME WHERE:

1. A CONTROLLED DELIVERY OF A PACKAGE WAS MADE TO A SUSPECT'S APARTMENT BUILDING AFTER ALL BUT ONE OUNCE OF THE ILLEGAL DRUGS HAD BEEN REMOVED FROM THE PACKAGE,
2. NO ATTEMPT WAS MADE TO OBTAIN AN ANTICIPATORY SEARCH WARRANT,
3. THE SUSPECT PICKED UP THE PACKAGE ADDRESSED TO HIS APARTMENT FROM THE APARTMENT MANAGER AND TOOK IT TO HIS APARTMENT,
4. THREE HOURS PASSED BEFORE THE CONCEALED BEEPER ALLEGEDLY WENT OFF DURING WHICH THE AGENTS MADE NO EFFORT TO OBTAIN AN ORDINARY SEARCH WARRANT,
5. ONLY ONE OF THREE AGENTS AT THE FRONT DOOR CLAIMED TO HEAR THE RUSTLING OF PAPER OR PLASTIC FROM INSIDE THE UNIT AFTER THE BEEPER ALLEGEDLY WENT OFF AND BROKE OPEN THE FRONT DOOR, AND

QUESTIONS PRESENTED FOR REVIEW
—Continued

6. UPON ENTRY TO THE APARTMENT, THE PACKAGE WAS FOUND UNOPENED AND THE SUSPECT WAS STANDING IN THE KITCHEN, THERE BEING NO EVIDENCE WHATSOEVER OF PAPER OR PLASTIC THAT COULD HAVE BEEN RUSTLED,

CONTRARY TO *UNITED STATES v. GRUBBS* AND *KENTUCKY v. KING*, AND (2) HAS CREATED A RULE THAT PROMOTES LAW ENFORCEMENT PERJURY CONTRARY TO THE PRINCIPLES OF *KENTUCKY v. KING*?

PARTIES TO THE PROCEEDINGS

Petitioner Bryant Kazuyoshi Iwai was the appellee in the court of appeals. Respondent is the United States.

RELATED CASES

None.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion below is published at 930 F.3d 1141 (9th Cir.2019). The order denying rehearing and hearing en banc is published at 950 F.3d 1286. The district court's decision denying petitioner's motion to suppress is unpublished.

JURISDICTION

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1). The decision of the Ninth Circuit was filed on July 23, 2019. A petition for rehearing and hearing en banc was filed on October 7, 2019, and denied on March 4, 2020. The district court had jurisdiction pursuant to 18 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The decision of the dissenting Ninth Circuit judge in *United States v. Iwai*, 930 F.3d 1141, 1148 (9th Cir.2019), contains the best concise statement of the facts in this case:

> Bryant Iwai was in big trouble. On August 4, 2015, postal inspectors identified a suspicious package addressed to Iwai, and a narcotics detecting dog alerted on the package. That same day, a postal inspector, working with an interagency task force comprised of agents from the Drug Enforcement Agency ("DEA") and officers from the Honolulu Police Department ("HPD"), obtained a search warrant to open the package. Inside were six pounds of crystal methamphetamine, a substantial haul. The following morning, August 5, HPD officers obtained a second warrant—referred to as a "beeper tracker warrant"—to conduct a controlled delivery to Iwai's apartment in Pearl City. Officers first removed the six pounds of meth and replaced it with rock salt and one gram of meth. They also added a GPS tracking device and a credit card-sized device that would alert the officers if the box was opened. The officers dusted the contents with

a black-light sensitive powder, repacked the box, and arranged for a postal inspector to deliver the box to Iwai's apartment complex in Pearl City the same day.

The task force was well prepared. Two officers dressed in plain clothes were in the manager's office where they could watch the lobby and the complex's surveillance cameras, a surveillance team was posted outside the building, another team covered the emergency exits, and a team was posted in the stairwell near the 23rd floor—Iwai's floor. The entire task force operation was directed by an HPD officer secreted in the stairwell of the 33rd floor. The officers observed Iwai leave the apartment at 11:15am. Then just before noon, the postal inspector took the box to the complex and spoke with the manager. Because the box was too large to fit in a mail slot or a parcel locker, the postal inspector called Iwai's apartment from the lobby. Iwai picked up the call on his cell phone, told the inspector that he was "on the road" and that his girlfriend would pick it up; after she did not, the inspector called again and offered to leave the package with the manager so that Iwai could pick it up later. Approximately an hour later, Iwai retrieved the box, and the officers observed him take it to his apartment on the 23rd floor. The teams waited patiently for some indication that the box had been opened. At about 3:15 p.m.—more than three hours since they had delivered the box and two hours since Iwai had picked it up—the beeper went off, indicating that the box may have been opened. Some

> seven officers on the stairwell on the 23rd floor geared up in body armor and, carrying a ballistic shield and a battering ram, went to Iwai's apartment. The lead officer in the stairwell, DEA Agent Jones, holding the shield and a drawn weapon, knocked on the door, yelled "police," and demanded that Iwai open the door. He kicked the door another three times and continued to demand that Iwai open the door. At that point, Jones looked through the peephole and saw a shadow moving. He announced several times, "Bryant, I can see you through the peephole. Open the door." Jones continued to knock and announce. Finally, Jones stopped knocking, and listening, he heard noises "like somebody going through a garbage can . . . like, a rustling of papers or plastic or something to that effect." Jones testified that he was afraid that Iwai was destroying evidence, so he ordered the officer with the ram to breach the door, and the officers spilled in. Iwai was alone inside, standing in the kitchen. The package containing the meth was in the living room, unopened. [930 F.3d at 1147-48]

REASONS FOR GRANTING THE PETITION

As set forth in *United States v. Pinela-Hernandez*, 262 F.3d 974, 978 (9th Cir.2001), *cert. denied*, 535 U.S. 1120 (2002):

> The [Supreme] Court has defined probable cause for a search as "a fair probability that

> contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *see also Wartson v. United States*, 400 F.2d 25, 27 (9th Cir.1968) ("Probable cause has also been defined as having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." (citation and internal quotation marks omitted)). Probable cause to search is evaluated in light of the totality of the circumstances. *Gates*, 462 U.S. at 238, 103 S.Ct. 2317.

The Ninth Circuit has applied a slightly more strident test requiring "[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," but this test preceded *Kentucky v. King, supra. United States v. Ruddell*, 71 F.3d 331, 333 (9th Cir.1995).

There is a strong preference for searches by search warrant and "in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fail." *United States v. Ventresca*, 380 U.S. 102, 106 (1965).

In *United States v. Grubbs*, 547 U.S. 90, 96-97 (2006), this Court held that:

> Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband,

evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found if the condition is met. (If that were the extent of the probability determination, an anticipatory warrant could be issued for every house in the country, authorizing search and seizure if contraband should be delivered—though for any single location there is no likelihood that contraband will be delivered.) *Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises.* In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. *It must be true not only that* if *the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place*," but also that there is probable cause to believe the triggering condition will occur. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination.

In this case, the occurrence of the triggering condition—successful delivery of the videotape to Grubbs' residence—would plainly

> establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied. Although it is possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely. The Magistrate therefore "had a 'substantial basis for . . . conclud[ing]' that probable cause existed." [Citations omitted.] [Emphasis added.]

And as stated by the dissenting judge below:

> Here, five officers testified at the suppression hearing that "[they] couldn't obtain an anticipatory search warrant." Well-trained, the officers each testified that they could not be certain that the package was on a "sure course" to Iwai's apartment. Their sole explanation for this belief was that "the parcel would not have been delivered to the exact unit" but rather "to the downstairs office area where residents of that place could actually come and pick up the parcels." The majority accepts this explanation, concluding that the officers had no way of knowing whether "the package would actually end up in Iwai's unit" or "whether the package would be retrieved in the central mail room and removed from the property and taken somewhere else." Maj. Op. at 1143. The officers' explanation for their decision and the majority's acceptance of that rationale are inconsistent with our cases and contradicted by the officers' own actions. [902 F.3d at 1149-1150]

Contrary to the testimony of the government agents, nothing prevented them from obtaining an anticipatory search warrant for Iwai's unit. The claim that the government agents did not know where the package would end up is not credible. The package was addressed to Iwai by name at the unit where he lived. There were only two possibilities in this case:

a. Iwai would pick up the package from the manager and take it to his unit; or

b. Iwai would pick up the package from the manager and take it somewhere other than his unit.

From common knowledge, the odds are quite high that he would take the package to his unit. There is no requirement for absolute certainty to obtain an anticipatory search warrant.

Again, as stated by the dissenting judge below:

> The majority excuses the lack of a warrant by pointing out that the police are not required to obtain a warrant "as soon as they have probable cause." Maj. Op. at 1144; *see Kentucky v. King*, 563 U.S. 452, 466–67 (2011). That is true but irrelevant. As the Supreme Court explained in *United States v. Watson*, "[t]here is no requirement that a search warrant be obtained the moment police have probable cause to search. The rule is . . . that present probable cause be shown and a warrant obtained *before a search is undertaken*." 423 U.S. 411, 449 (1976) (emphasis added). The fact the officers did not have to obtain a

warrant the moment they had probable cause is not an excuse for failing to obtain one at all. Moreover, the consequences of the failure to obtain an anticipatory warrant are quite predictable—and those consequences benefit neither the government nor the subject of the search. As the First Circuit anticipated, "[w]ere 'anticipatory warrants' unlawful, law enforcement agents would have to wait until the triggering event occurred; then, if time did not permit a warrant application, they would have to forego a legitimate search, or more likely, simply conduct the search (justified by 'exigent circumstances') without any warrant at all." *United States v. Gerndon*, 18 F.3d 955, 965 (1st Cir. 1994) (Breyer, J.). Thus, the Eleventh Circuit concluded, anticipatory warrants "better serve the objective of the Fourth Amendment by allowing law enforcement agents to obtain a warrant in advance of delivery, rather than forcing them to go to the scene without a warrant and decide for themselves, subject to second-guessing by judicial authorities, whether the facts justify a search." *United States v. Santa*, 236 F.3d 662, 673 (11th Cir. 2000).

The controlled delivery here was on a sure course to Iwai's apartment, the officers knew it and acted on it, and they had probable cause—well-established in our cases—to obtain an anticipatory warrant. They should have done so and spared us the task of second-guessing their decision.

II

Even if the officers reasonably believed they could not obtain an anticipatory warrant, that does not excuse their failure to seek a warrant once they knew that Iwai had taken the package to his apartment. Exigency alone is insufficient to justify the officers' warrantless entry. Rather, to establish exigency, "the government must also show that a warrant could not have been obtained in time, . . . [and] that a telephonic warrant was unavailable or impractical." *United States v. Good*, 780 F.2d 773, 775 (9th Cir. 1986) (internal citation omitted); *cf. United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1999) ("[T]he appropriate inquiry is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced agent to believe that evidence might be destroyed *before a warrant could be secured*.") (emphasis added) (quoting *United States v. Rivera*, 825 F.2d 152, 156 (7th Cir. 1987)). "[I]f the state had time to obtain a warrant, it stands to reason that there can be no 'exigent circumstance.'" *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 791 (9th Cir. 2016) (en banc).

The government made no effort to show that the task force could not have obtained a warrant in time. The officers observed Iwai take the package into his apartment at 12:50 pm. At that point, there was no debate that they had probable cause to obtain a warrant to search the apartment. There were a dozen officers on site, and the officers had already

obtained two warrants in previous 24 hours—one that very morning at 9 am. Moreover, it would have been easy for the officers to prepare an application in advance (even if they didn't submit it as an anticipatory warrant), to call in if Iwai took the package into his apartment. Yet they made no effort to do so. Instead, the officers waited "around the apartment building's perimeter, inside the building manager's office, and in stairwells near . . . Iwai's apartment," for four hours—and during two and a half of those, they were *absolutely certain* the drugs were inside the apartment. A warrant could have been obtained telephonically within minutes. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2192 (2016) ("'[A]dvances' in technology . . . now permit 'the more expeditious processing of warrant applications.'") (Sotomayor, J., concurring in part and dissenting in part) (quoting *Missouri v. McNeely*, 569 U.S. 141, 154 n.4 (2013)); *Leidner*, 99 F.3d at 1425 & n.1 (explaining that a judge orally authorized search after delivery was made to the residence); *see also* Fed. R. Crim. P. 4.1 (describing the procedure for obtaining a warrant by telephone); *id.* 41(d)(3) (authorizing telephone search warrants); Haw. R. Penal P. 41(h)–(i) (allowing warrants to be obtained over the phone via an oral affidavit). But the officers neither obtained a warrant nor provided any explanation why they failed to do so—or even attempted to. Here, a warrant was available and practical, and thus the officers cannot claim exigency. *See United States v. Alvarez*,

> 810 F.2d 879, 884 (9th Cir. 1987) ("The action of the agents and the Assistant United States Attorney in ignoring the telephone warrant procedure totally frustrates the accommodation approved by Congress. It cannot be sanctioned by us."). [930 F.3d at 1153-1155]

The preference in the law for a search warrant where possible is the salient point in this case. Under the circumstances, the government could have easily obtained an anticipatory search warrant. After Iwai took the package to his apartment, an ordinary search warrant could also have been obtained. However, the government agents never even tried and claimed that it was not possible. There was no excuse for not getting a warrant after the package was in Iwai's apartment. This Court cannot permit the kind of bogus exigent circumstances in this case to override the warrant preference, a preference that could have been easily accommodated.

Again, as stated by the dissenting judge below:

> Finally, I have at least a nagging feeling that "[t]he agent[s'] actions in this case were . . . fundamentally inconsistent with any true exigency." *Alvarez*, 810 F.2d at 882. This is a closer issue for me, but I am deeply concerned that the officers jumped the shark when they claimed they were entitled to enter Iwai's apartment on the basis of observing furtive movements through a peephole and hearing the rustling of paper and plastic. I have two concerns: First, that the officers lacked reasonable indicia that Iwai was about destroy [sic]

> any evidence and, second, that any exigency here resulted from the officers' own violations of the Fourth Amendment. [930 F.2d at 1155]

In *Kentucky v. King*, 563 U.S. 452, 459-62 (2011), this Court held that:

> The text of the [Fourth] Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.
>
> Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. "It is a 'basic principle of Fourth Amendment law,'" we have often said, "'that searches and seizures inside a home without a warrant are presumptively unreasonable.'" But we have also recognized that this presumption may be overcome in some circumstances because "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Accordingly, the warrant requirement is subject to certain reasonable exceptions.
>
> One well-recognized exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." ("[T]he 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").

This Court has identified several exigencies that may justify a warrantless search of a home. Under the "emergency aid" exception, for example, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. And—what is relevant here—the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search.

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called "police-created exigency" doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was "created" or "manufactured" by the conduct of the police.

* * *

In applying this exception for the "creation" or "manufacturing" of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, as the Eighth Circuit has recognized, "in some sense the police always create the exigent

circumstances." That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well established exception to the warrant requirement.

* * *

III

A

[T]he answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in

> the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed. [Citations and footnotes omitted.]

The Fifth Circuit has examined the following factors to determine whether exigent circumstances exist:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant;
>
> (2) [the] reasonable belief that the contraband is about to be removed [or destroyed];
>
> (3) the possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought;
>
> (4) information indicating the possessors of the contraband are aware that the police are on their trail; and
>
> (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic."

United States v. Richard, 994 F.2d 244, 248 (5th Cir.1993). It is submitted that a sixth factor should be the ease of government agents to get around the search warrant requirement by contrived testimony claiming a bogus exigent circumstance such as alleged noises

inside the residence indicating destruction of evidence heard only by one of three agents immediately outside at the front door.

The government agents in this case testified that they could not obtain an anticipatory search warrant in this case because they could not determine where in Iwai's building the package was going. Thus, when the beeper in the package allegedly went off by mistake and the agents gathered at Iwai's front door, one agent claimed that they had exigent circumstances to enter Iwai's unit when *only* one agent of three immediately by Iwai's front door allegedly heard a sound from inside the unit as if someone was tearing paper or plastic. When the agents forcibly entered Iwai's unit, the package was intact. Iwai was standing in the unit kitchen. There was no evidence whatsoever of any torn paper or plastic in Iwai's apartment.

Most importantly, there was no threat that the drugs originally in the package could be destroyed. All but one gram of more than a kilogram had been removed and rock salt had been substituted. Thus, the claimed basis for the exigency could not possibly have existed.

> Where the existence of probable cause is a close question and the police had ample opportunity to obtain a warrant in advance, we are bound to disfavor the state's later contention that probable cause existed. [Citation omitted.]

United States v. Impink, 728 F.2d 1228, 1232 (9th Cir.1984).

The existence of exigent circumstances in this case is a close question. If there had really been some paper or plastic torn which caused an audible sound heard by only one of three agents at Iwai's front door, there would have been torn paper or plastic in the unit to support the government's claim. The fact there was apparently no such evidence is the best evidence that the lead agent heard no such sounds and perjured himself at the suppression hearing. Also, it should be significant that the two other agents at Iwai's front door heard no such noises. After *Kentucky v. King, supra*, the instant case presents the classic situation inviting law enforcement perjury to evade the warrant requirement. All an officer has to do is claim he or she heard tearing sounds *and no corroborating evidence is required*. Such a standard requiring no corroborating evidence makes a mockery of the exigent circumstance requirement. The Majority Opinion's finding of exigent circumstances defies belief on the facts of this case.

CONCLUSION

This Court should grant the petition because the majority opinion is contrary to *United States v. Grubbs* and *Kentucky v. King*, as well as to establish clear guidance on the following important issues for law enforcement and the courts:

1. Whether the absence of some corroborating evidence when a government agent claims to have heard noises inside a home indicating the destruction of evidence is a

factor in determining exigent circumstances.

2. Whether the absence of such evidence violates the principles governing the application of anticipatory search warrants.

3. Whether the fear of destruction of evidence is a viable reason for the warrantless search of a home when government agents remove all but one gram from a package before a controlled delivery to the home.

4. Whether law enforcement is required to obtain an anticipatory search warrant on the facts of this case and cases with similar facts.

Respectfully submitted,

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