No. _____

In The
Supreme Court of the United States

AKARI WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Failing to file a suppression motion is not *per se* ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). But a trial counsel's failure to file a pretrial motion to suppress is objectively ineffective when the trial court denies a subsequently-appointed counsel's after-the-fact motion – based upon sufficient grounds to suggest a motion to suppress would have affected the outcome of the proceedings – to rectify the failure to file the motion.

The two underlying issues that trial counsel failed to challenge support a certificate of appealability regarding ineffectiveness of counsel: (1) whether law enforcement can search a different residence under a "general search warrant" that fails to conform to the particularity requirement of the Fourth Amendment; or alternatively, (2) whether law enforcement, who fail to timely execute that general warrant, may use it to create exigent circumstances to enter the second residence.

Therefore, the question before the court becomes:

Is a defendant entitled to a certificate of appealability to challenge a denied 28 U.S.C. §2255 motion on ineffective assistance of counsel when an attorney fails to timely file a motion to suppress evidence obtained by law enforcement who (1) relied upon a general search warrant for one address to search a different residence, or alternatively, (2) failed to timely execute the general warrant at the first residence so as to create exigent circumstances to search a second residence?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. United States of America, through the Department of Justice.

2. Akari Williams, an individual convicted of conspiring to distribute 500 grams or more of methamphetamine, and possessing with intent to distribute 500 grams or more of methamphetamine.

CORPORATE DISCLOSURE

The United States of America is a body politic. The Department of Justice, led by the Attorney General as its law enforcement branch, was created in 1870.

LIST OF RELATED CASES

United States v. Williams, 20-30421 (5th Cir.). Order entered April 16, 2021.

United States v. Williams, 14-153, 2020 WL 2850142 (E.D. La.). Order entered July 2, 2020.

United States v. Williams, 774 Fed.Appx. 871 (5th Cir. 2019).

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The United States Fifth Circuit Court of Appeal, through Circuit Judge Stuart Kyle Duncan, denied Williams's motion for a certificate of appealability on April 16, 2021. App. 1.

The Louisiana Eastern District Court issued a judgment on July 2, 2020, denying Williams's motion to vacate, set aside, or correct a federal sentence under 28 U.S.C. §2255. App. 2, App. 3-23 (Reasons).

The trial court denied Williams's motion for a certificate of appealability. App. 24.

JURISDICTION

This court has jurisdiction under 28 U.S.C. §1254.

RELEVANT CONSTITUTION PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> 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.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Akari Williams was convicted by jury of conspiracy to "distribute and possess with the intent to distribute 500 grams or more of a substance containing a detectable amount of methamphetamine" and of "knowingly and intentionally possess[ing] with the intent to distribute 500 grams or more of a substance containing a detectable amount of methamphetamine." Williams was sentenced to 188 months of imprisonment for each count, to be served concurrently, following by five years of supervised release. *United States v. Williams*, 774 Fed.Appx. 871, 872 (5th Cir. 2019).

The indictment and conviction emanated from the controlled delivery of a package sent from California to Houma, Louisiana. *Id.*, 774 Fed.Appx. at 873. Williams

was arrested when the intended addressee – John Lirette at 332 Grace Street – accepted the package and traveled to the Williams's residence at 313 Grace Street, where the package was opened. Though law enforcement had a general warrant to search the addressee's residence, 332 Grace Street, it had neither a search warrant for Williams's residence, 313 Grace Street, nor an arrest warrant for any individual inside Williams's residence. Nevertheless, when the package was opened, law enforcement was alerted by a beeper placed within the package. They entered Williams's residence, arresting the Williams and others.

Williams was indicated along with two co-defendants, Lirette and Philips Thompson, for various drug-related crimes. Before trial, Thompson moved to suppress the evidence on two grounds. First, he challenged the initial search in California. Second, he challenged the seizure of his cell phone which occurred when he arrived in New Orleans, Louisiana, via flight from California. Lirette adopted Thompson's pre-trial motion. Williams neither adopted Thompson's pre-trial motion nor did he file his own suppression motion. The trial court denied the motion. App.6.

Lirette's trial was severed. A jury convicted Williams and Thompson as charged. Through a newly court-appointed attorney,[1] Williams filed a motion for

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[1] Williams's initial trial counsel was permitted to withdraw subject to trial but prior to any post-trial motions and sentencing. As of the filing of this writ of certiorari, by joint petition for consent discipline, Williams's attorney is suspended from the

judgment of acquittal and new trial, arguing the evidence should have been suppressed. App. 7. Williams admitted he did not file a pretrial motion to suppress, but claimed "he effectively joined the pretrial motion to suppress filed by counsel for Philips Thompson" when his trial counsel orally moved to adopt all pleadings filed by co-defendants. App. 7.

The district court determined Williams failed to timely submit his motion to suppress and overruled his motion to join co-defendants's motion. Williams's motion for acquittal was denied. *Id.* Thompson was ultimately acquitted based on the district court's post-trial reconsideration and granting of the earlier, timely-filed pretrial motion to suppress.

The United States Fifth Circuit affirmed the trial court denial of Williams's motion for acquittal. *Williams*, 774 Fed.Appx. at 875. It also found no "plain error" with the district court's rulings that Williams lacked an expectation of privacy in the delivery and admission of text messages as evidence intrinsic to the acts for which Williams was charged. *Id.*, supra, at 878.

Williams thereafter filed a *pro se* motion under 28 U.S.C. §2255 to vacate, set aside, or correct his sentence. Williams initially raised three grounds: (1) the district court erred in denying a motion for acquittal under Rule 29 since the evidence was insufficient to establish his guilt beyond a reasonable doubt; (2) the district court erred in denying his motion

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practice of law. *See In re: Robert C. Jenkins, Jr.*, 2021-B-00293 (La. 4/7/21), 313 So.3d 260.

to suppress evidence, both pre-trial and post-trial; (3) his rights to due process and a fair trial were violated when the district court allowed the government to present evidence of other packages. Williams amended his petition to assert as a fourth ground that his trial counsel was ineffective for failing to timely file a motion to suppress based on law enforcement using a search warrant for 332 Grace Street to enter his residence at 313 Grace Street where he was arrested.

The district court denied Williams's petition. App. 2. It also denied his motion for certificate of appealability. App. 24. Williams sought a certificate of appealability from the United States Fifth Circuit. The court, through a single circuit judge, denied his motion. App. 1.

ARGUMENT

I. This court has the jurisdiction to grant a certificate of appealability.

This court has jurisdiction under 28 U.S.C. §1254(1) to review denials of application for certificates of appealability by a circuit judge or a panel of a court of appeals. *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). A certificate of appealability should issue " . . . if the applicant has made a substantial showing of a denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (internal citations

omitted). *See e.g.*, *Edwards v. Vannoy*, ___ So. ___, 141 S.Ct. 1547, 209 L.Ed. 651 (2021).

A petitioner who makes a "substantial showing" by demonstrating his petition involves issues debatable among jurists of reason, that another court could resolve the issues differently, or the issues are adequate to deserve encouragement to proceed further is entitled to a certificate of appealability. *Miller-El*, 537 U.S. at 330. *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

While a certificate of appealability inquiry is not coextensive with a merits analysis, this court should review in detail the evidence concerning the petition. *Miller-El*, supra ("our determination to reverse the Court of Appeals counsels us to explain in some detail the extensive evidence concerning the jury selection procedures.").

II. The certificate of appealability standard favors Williams.

Williams is entitled to a certificate of appealability. A review of the threshold prerequisite to appealability demonstrates his trial attorney's ineffective assistance, in failing to file a motion to suppress, denied Williams the chance for an adjudication of the merits.

Whether evidence obtained by law enforcement who rely upon a general search warrant for one residence as exigent circumstances to search a second

residence is an issue debatable among jurists of reason or, minimally, an issue that deserves encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). As a matter of law, Williams is not required to show an appeal will succeed. *Miller-El*, 537 U.S. at 337. The court of appeals should not decline the application for a COA merely upon a belief the applicant has not demonstrated entitlement to relief. *Id.* Rather, any doubt whether to grant a COA is resolved in favor of the petitioner. *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997), *cert. denied*, 522 U.S. 963, 118 S.Ct. 399, 139 L.Ed.2d 312 (1997). Beliefs of success or failure on the merits aside, any doubt should be resolved in favor of Williams.

III. Williams's counsel was ineffective for failing to file a motion to suppress.

Since Williams's claim rests on an ineffective assistance of counsel violation, resolution of his certificate of appealability application requires a preliminary, though not definitive, consideration of the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To succeed, Williams must demonstrate that (1) counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and (2) there is a rea-
sonable probability that prejudice resulted, *i.e.*, that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 668; *United States v. Allen*, 918 F.3d 457 (5th Cir. 2019).

With respect to the first prong of *Strickland*, Williams must identify an "act or omission" of his trial counsel. *United States v. Dowling*, 458 Fed.Appx. 396 (5th Cir. 2012). Williams meets this prong by showing under the "totality of the circumstances," the attorney's performance was outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690. The defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Allen*, 918 F.3d at 461 (quoting *Strickland*, 466 U.S. at 689). Williams can overcome this hurdle by demonstrating his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Because Williams's ineffective assistance claim centers on his trial counsel's failure to raise a Fourth Amendment claim, in order to satisfy the actual prejudice prong of the *Strickland* test, Williams "must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the [outcome of his case] would have been different absent the excludable evidence. *Dowling*, 458 Fed.Appx. at 398, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. More so, when there is a "breakdown in the adversarial process," the "fundamental fairness of the proceeding" is implicated. *Strickland*, 466 U.S. at 696.

The *Strickland* evaluation is predicated upon an accused's entitlement to be "assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Kimmelman*, supra at 377. The right to counsel is "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Ineffective assistance is considered under *Strickland* as representation falling below the objective standard of reasonableness based on prevailing professional norms. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). While "[j]udicial scrutiny of counsel's performance must be highly deferential" . . . "[t]his measure of deference . . . must not be watered down into a disguised form of acquiescence." *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990).

Though Williams's trial attorney failed to file any pre-trial suppression motion, a newly-appointed attorney joined his co-defendants in their post-trial motion for the court to reconsider an earlier motion to suppress. At this point, Williams's new attorney realized the earlier error and made an eleventh hour attempt to salvage relief. But for Williams, it was too little, too late. This Court does not need to engage in hindsight to determine by attempting to file a post-trial motion to suppress. Williams's second attorney found it necessary to immediately act after the trial; this act "affirmatively acknowledged" that Robert Jenkin's failure to file the motion to suppress during the pre-trial stage was not strategical.

Granted, courts are not to permit unreasonable decisions under the catch-all of trial strategy, or to make decisions behalf of counsel when it appears that it was not a strategic decision. But when the court finds counsel "failed to show 'good cause' as to why the Court should consider his untimely motion to suppress," the die is cast.

Williams received ineffective representation.

The district court noted that although his trial counsel "made an oral motion to adopt all pleadings filed by co-defendants during the pendency of the case," accepting Williams's argument that he effectively joined a pretrial motion would improperly allow him to circumvent the Federal Rules of Criminal Procedure that require a "defendant file a motion to suppress before trial so long as the basis for the motion is reasonably available and the motion can be determined without a trial on the merits."

The court found Williams was aware that the package was opened and that the evidence collected would be used to establish his involvement in the charged conspiracy. More so, through discovery Williams learned of the warrant obtained to enter the residence at 332 Grace Street; he obviously knew that law enforcement entered the residence at 313 Grace Street without a warrant. A motion to suppress would have shown that Williams owned both homes and lived at both homes, despite the government's contention that Lirette leased the 332 Grace Street residence. Only a hearing would have allowed the court to listen

to the facts – a hearing in which Williams could have testified unhampered by fear of later incrimination – and then determine whether Williams had a reasonable expectation of privacy in both locations. After all, testimony given by a defendant to meet standing requirements to raise an objection that evidence is fruit of an unlawful search and seizure should not be admissible against him at trial on question of guilt or innocence. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

Williams also had the legal right to challenge whether the search warrant issued for the 332 Grace Street house could serve as exigent circumstances for the failure of law enforcement to obtain a warrant to enter the 313 Grace Street home. Despite William's standing, his trial counsel failed to file a motion to suppress.

Along these lines, there is no plausible explanation for the failure of Williams's trial counsel to timely act. Jenkins' performance was constitutionally deficient. *See Kimmelman*, 477 U.S. at 385-386 (finding counsel's failure to file motion to suppress objectively unreasonable because the record suggested "no better explanation" for his failure than "ignorance of the law" and "a complete lack of pretrial preparation"); *Tice v. Johnson*, 647 F.3d 87, 106 (4th Cir. 2011) ("There is simply nothing we can discern from the record that would excuse the defense team's failure to move to suppress [the defendant's] confession.").

A preponderance of the evidence militates in Williams's favor that his trial counsel was ineffective for failing to file a pre-trial motion to suppress. He should be given the opportunity to have the appellate court fully review his §2255 motion regarding his attorney's ineffective performance.

IV. The warrant was invalid; it lacks for specificity or particularity.

Williams's attorney was ineffective for failing to challenge the warrant for a search of the 332 Grace Street home. A timely filed motion would have shown the affidavit was defective. The warrant lacked specificity or particularity, a bulwark of the Fourth Amendment reasonableness:

> **AFFIDAVIT(S) HAVING BEEN MADE BEFORE ME BY Detective Ronald James McKay**, of the **TERREBONNE PARISH SHERIFF'S OFFICE**, that they have good reason to believe that on or in a property located at 332 GRACE STREET, HOUMA, LA, 70364, located within the PARISH OF TERREBONNE, STATE OF LOUISIANA, there is now being concealed certainly properly, namely, WHILE TRAVELING ON HIGHWAY 24 SOUTH, TURN RIGHT ONTO GRACE STREET, TRAVEL DOWN GRACE STREET UNTIL THE ADDRESS OF 332 GRACE STREET, THE RESIDENCE AT 332 GRACE STREET IS A MOBILE HOME, LOCATED ON THE RIGHT SIDE OF THE STREET. THE MOBILE HOME STRUCTURE IS TAN

IN COLOR WITH WHITE TRIM. THE DRIVEWAY AND CARPORT IS ON THE LEFT SIDE OF THE RESIDENCE. IT APPEARS TO HAVE AN ATTACHED STRUCTURE ON THE LEFT SIDE OF THE TRAILER NEAR THE CARPORT. THERE IS A BACKDOOR AND STEPS ON THE RIGHT SIDE OF THE TRAILER. THERE IS ALSO A (sic) ENTRANCE ON THE LEFT SIDE OF THE TRAILER NEAR THE CARPORT. THE ADDRESS OF 332 GRACE STREET IS CLEARLY MARKED ON THE MAILBOX IN FRONT OF THE MOBILE HOME NEAR THE STREET. TPCG GIS MAPPING: REAL PROPERTY FOR AKARI WILLIAMS, which said property constitutes evidence in the violation of La. R.S. 1 Count of 40:967A(1) – POSS. W/INTENT TO DIST. CDS II (METH-AMPHETAMINE) – (FELONY) of the Louisiana Revised Statutes, and as I am satisfied from the affidavit(s) submitted in support of the application for this warrant that there is probable cause to believe that the aforesaid property is being concealed on or in the ALL VEHICLES AND STRUCTURES ON PROPERTY above described, and the aforesaid grounds for the issuance of this warrant exists.

YOU ARE HEREBY ORDERED to search forthwith the aforesaid ALL VEHICLES AND STRUCTURES ON PROPERTY for the property specified . . .

The search warrant is extremely deficient and self-contradicting. According to a plain reading of the warrant:

1. the trailer is concealed ("now being concealed certain property, namely . . . " (a description of the address and of the trailer));

2. the trailer constitutes evidence of an alleged drug violation ("said property constitutes evidence of the violation of La. R.S. 1 Count of 40:967(A)(1) . . . ");

3. The premises is to be searched **forthwith**, not conditioned upon the occurrence of an event or even makes any mention of the anticipatory delivery. (Emphasis added).

4. And as regards the above argument regarding standing, the warrant clearly fails to state Kerry Lirette resides at the 332 Grace Street address, but rather makes clear that Akari Williams is the owner of the trailer.

The Fourth Amendment states unambiguously that "no Warrant 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*." The Fourth Amendment facially requires particularity in the warrant rather than in the supporting documents. *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). This warrant falls well short of the basic, constitutionally

required particularity. It describes the trailer as the concealed property, with said property, the trailer, "constitut[ing] evidence of violation of La. R.S. 1 Count of 40:967A(1) – POSS. W/ INTENT TO DIST. CDS. II (METHAMPHETAMINE) – FELONY. (ROA.1023). As drawn, the warrant authorizes a forthwith search of all vehicles and structures on the property for the property specified. The warrant essentially allows a search of the trailer to find whether the trailer is concealed which itself (the trailer) constitutes evidence of the alleged possess with intent to distribute narcotics.

Such a poorly drawn warrant violates the Fourth Amendment. In *Groh*, the application stated the search was for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." *Groh*, 540 U.S. at 554. The warrant, however, was less specific; it failed to identify any of the items that petitioner intended to seize. *Id.* Much like here, in *Groh*, in the portion of the form that called for a description of the "person or property" to be seized, petitioner typed a description of respondents' two-story blue house rather than the alleged stockpile of firearms. The warrant did not incorporate by reference the itemized list contained in the application. It did, however, recite that the Magistrate was satisfied the affidavit established probable cause to believe that contraband was concealed on the

premises, and that sufficient grounds existed for the warrant's issuance. *Groh*, 540 U.S. at 554-555.

This court found the warrant in *Groh* plainly invalid. *Id.* The court held "the fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity," because the Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. *Groh*, 540 U.S. at 557, citing, in part, *Massachusetts v. Shepard*, 468 U.S. 981, 988, n. 5, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) ("[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."). (Emphasis provided).

Because Williams's attorney failed to challenge the warrant, there is no practical or just way to discern whether the warrant incorporated the other documents or whether the affidavit and supporting documents were attached to the warrant. The only reasonable item that could be seized under this warrant was the trailer. The warrant was so facially deficient that the court must regard the warrant as unconstitutional as defined by jurisprudence.

A. Classifying the warrant as "anticipatory" does not cure its deficiency.

An "anticipatory warrant" is generally defined as a warrant based upon an affidavit showing probable cause that at some future time . . . certain evidence of crime will be located at a specified place. *United States v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494, 164 L.Ed.2d 195

(2006) (internal quotations omitted). The execution of most anticipatory warrants is subject to the occurrence of a "triggering condition," which serves as the bridging nexus to establish probable cause. *Id.* Search of the premises is permitted when it is know that contraband is on a sure course to its destination. *See United States v. Wylie*, 919 F.2d 969 (5th 1990) (joining five other circuits in approving of the use of the anticipatory warrant in appropriate instances). In one instance, the "anticipatory warrant" is no different in principle from a general warrant. It requires the magistrate to determine (1) there is *now probable cause* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. *Grubbs*, 547 U.S. at 96. (Emphasis added).

The "anticipatory warrant" places a condition upon its execution, the first of which determines not merely what will probably be found *if* the condition is met. *Id.* The probability determination for a conditioned anticipatory warrant looks to the likelihood that the condition will occur, and thus that a proper object of seizure will be made on the described premises. In other words, this court noted in *Grubbs* that 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 trigger 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 event *will* occur. *Grubbs*, 547 U.S. at 96-97.

According to *Grubbs*, only two matters must be "particularly describe[d]" in the warrant: "the place to be searched" and "the persons or things to be seized." *Id.* at 97. In *Grubbs*, the court excused the absence of a triggering event because the warrant – on its face – stated it was an anticipatory warrant.

The *Grubbs* decision remains consistent with *Groh* – the particularity requirement provides written assurances that the magistrate actually finds probable cause to search for, and to seize, every item mentioned and that the executing officer is left with no discretion to decide what may be seized. *Schanzle v. Haberman*, 2019 WL 3220007 (W.D. Tex. Austin Div. 2019). *Groh* and *Grubbs* to the contrary, the warrant herein still ordered execution "forthwith." Acknowledging *Groh* does not require the warrant itself to contain a description of the triggering event, Williams contends a warrant that requires execution "forthwith" is contradictory to a warrant that requires execution upon a condition precedent and defeats the purpose of an "anticipatory warrant." Here, probable cause in the warrant application only supported the issuance of an anticipatory warrant, not the traditional general warrant issued by the court.

That distinction is particularly important for Williams: the cure by affidavit exception is not evident here (there is no testimony that the affidavit accompanied the warrant at the time of the search). A

warrant can be cured by attachment of the affidavit. *See United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981), *writ denied*, 455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed.2d 140 (1982) (An ambiguous warrant may be cured only if the affidavit is attached to the warrant so that the executing officer and the person whose premises are to be searched both have the information contained in the affidavit, in addition to what is said on the face of the warrant). *See also United States v. Beaumont*, 972 F.2d 553 (5th Cir. 1992), *certs. denied*, 507 U.S. 1054, 113 S.Ct. 1953, 123 L.Ed.2d 657 (1993), 508 U.S. 926, 113 S.Ct. 2384, 124 L.Ed.2d 288 (1993).

But there is no evidence here that the affidavits were attached to the warrant because Williams's attorney failed to challenge it. And there is nothing that allows to court to assume the affidavit was attached to the warrant. Given that Williams bore the burden of proof in a motion to suppress, *United States v. Various Gambling Devices*, 478 F.2d 1194 (5th Cir. 1973), the defendant is clearly prejudiced by the ineffectiveness of his counsel neglecting to file an appropriate motion.

With no clear indication of the triggering event, the executing officers were forced to use their discretion to discern how to execute the warrant. The scope of the warrant alone allowed the premise to be searched *forthwith*, which in a common sense terminology means to act immediately Thus, at the time the warrant was issued, there was no probable cause to expect that the drugs, which were delivered the following day, were in the premises.

Anticipatory warrants, though valid, must be "explicit, clear, and narrowly drawn." *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993). This is necessary because probably cause does not exist unless and until the trigger event occurs. *See*, *e.g.*, *United States v. Hotal*, 143 F.3d 1223, 1225-1226 (9th Cir. 1998) (warrant authorized and directed law enforcement to search premises forthwith, without qualifying language to inform the police that the warrant could not be served until the contraband had been delivered.

When the warrant was issued, there was no probable cause to expect that the drugs were in the premises; the probable cause requirement was satisfied only when the drugs were delivered. The warrant the judge issued was beyond the scope justified for searching forthwith; it is therefore void. Here also, the lack of nexus between the warrant and the unconstitutional search of 313 Grace Street, law enforcement had no authority to search Williams's truck, where they recovered a firearm (registered) that was used against him.

The government cannot be given the benefit of the doubt. The warrant herein is not an "anticipatory warrant" like in *Grubbs*. It is clearly a "traditional warrant," for which probable cause does not exist. Close review of the affidavit indicates the officers sought an "anticipatory warrant," but botched the application which the Louisiana District Court Judge overlooked when he signed the warrant. The warrant does not state it is anticipatory, contain a triggering event, or even mention a controlled delivery. Absent

execution of the 332 Grace Street warrant, officers had no reason to breach Williams's door at 313 Grace Street. There is no independent source for the breach by use of the bad warrant.

In *Rogers v. Lee County, Mississippi*, 684 Fed.Appx. 380 (5th Cir. 2017), the court reviewed the underlying criminal matter to determine whether officers had qualified immunity. In the underlying case, *United States v. Rogers*, No. 1:09-CR-139, 2013 WL 435946 (N.D. Miss. 2013), the district court concluded police officers were not objectively reasonable in relying upon a warrant issued for address 320 CR 401 as a basis to search nearby address 320A as well as a truck parked some distance away. The court said:

> There is a palpable difference between doing the best one can in interpreting and executing a search warrant that is, ultimately, found wanting – and knowingly cutting corners while executing the warrant, then relying upon the good-faith exception to the exclusionary rule to rescue the unlawful search. The officers in the present case chose the latter. *Rogers*, 684 Fed.Appx. at 384.

The court further held that because the officers' actions exceeded the scope of the warrant, suppression of the evidence was necessary. *Rogers* at 383.

B. A warrant that fails for lack of particularity or specificity is unconstitutional.

The purpose for the specificity rule, *see Groh* and *Hotal*, is to eliminate any chance of error. The courts do not consider what happens during the execution of a search warrant that fails for lack of specificity even if the officer's actions are conducted in a legal manner. A warrant that is not specific is unconstitutional.

The protective power of the Fourth Amendment is at its highest when government officials contemplate a search within an individual's home since the right to be free from unreasonable governmental invasion at home is at the Fourth Amendment's very core. *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). Because general search warrants were considered the most destructive of English law, the Fourth Amendment demands the government articulate a sufficient need not only for a search, but for the specific search to be executed, describing the particular place at issue to be searched and leaving nothing to the discretion of the officer executing the warrant when it comes to what may be seized. *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed.2d 231 (1927).

Because the warrant issued herein lacked specificity and particularity, the filing of a motion would have led to a suppression of the evidence regardless of what transpired thereafter under the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*,

371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). A bad warrant cannot create an independent source; a motion to suppress would have led to exclusion of the evidence seized at the 313 Grace Street address where law enforcement entered without a warrant or on created grounds under the independent source doctrine.

V. A protective sweep of 313 Grace Street was not carried out for the protection of police.

The district court held law enforcement could enter 313 Grace Street to conduct a "protective sweep," App. 20-23, as an independent source to the warrantless entry. "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). A protective sweep must be justified by probable cause that a serious and demonstrable potential for danger exists and the sweep will reduce the danger to law enforcement or limit interference with their mission. Additionally, for a protective sweep exception to address a risk to police safety – as an exception to support a warrantless entry – the government must identify "*specific* facts, which, combined with reason-able inferences from those facts, gave rise to the conclusion that the warrantless intrusion was appropriate." *Andrews v. Hickman County*, 700 F.3d 845, 857 (6th Cir. 2012) (internal citations omitted) (emphasis added).

The protective sweep at 313 Grace Street was not carried out for protection of law enforcement because law enforcement did not have a warrant to enter the premises. Law enforcement secured a general search warrant for 332 Grace Street, the address of the controlled delivery. They did not obtain a warrant to arrest Lirette nor make any effort to arrest Lirette when he left the 332 Grace Street residence within minutes of receiving the package. Based upon the probable cause for their search warrant, law enforcement had every right to stop Lirette once he exited the 332 Grace Street residence or before he entered the 313 Grace Street residence.

But law enforcement did not arrest or detain Lirette at that juncture. They used the pretext of a "protective sweep" to enter the 313 Grace Street residence for which no facts existed to arguably suggest the residents therein presented danger. In fact, the officers could have staked out the second residence, as they did 332 Grace Street, while awaiting the controlled delivery, and detained or subjected to a pat-down any person who exited the 313 Grace Street premises. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Regardless, the government cannot claim the protective sweep as an exception to a bad warrant. *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 ("a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid").

Additionally, the trial court's ruling that Lirette's quick movement and the opening of the package along with Williams (allegedly) saying "flush it" is insufficient to support the agent's entry into the residence and for their execution of a protective sweep. The absence of any motion by William's attorney merely allowed the court to accept the government's evidence as though judicially admitted. A complete and thorough hearing on the issue may have affirmed the trial court's finding, but conversely could have developed facts that put the officer's testimony and credibility at issue.

VI. Law enforcement unconstitutionally created the exigency they relied upon to enter 313 Grace Street.

The "protective sweep" in this case was police created, and therefore, a violation of Williams's Fourth Amendment rights. Federal courts consistently hold that police themselves cannot create the exigency to justify an unwarranted entry into a residence. *United States v. Acosta*, 965 F.2d 1248 (3rd Cir. 1992); *United States v. Timberlake*, 896 F.2d 592 (D.C. Cir. 1990).

In *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995), *cert. denied*, 516 U.S. 883, 116 S.Ct. 220, 133 L.Ed.2d 150 (1995), for example, the Fifth Circuit explained that "[j]ust as exigent circumstances are an exception to the warrant requirement, a policy manufactured exigency is an exception to an exception." The court in *Rico* explained that police officers may not

create the emergency situation and then rely on that emergency to justify a warrantless entry. While exigencies deliberately manufactured by police officers are plainly unconstitutional, even exigencies "manufactured guilelessly" may violate the Fourth Amendment. *Id.*

The proper inquiry focuses not only on evidence of bad faith, but also on the "reasonableness and propriety of the agents' investigative tactics." *Rico*, supra. The Eighth Circuit, in *United States v. Duchi*, 906 F.2d 1278, 1285 (8th Cir. 1990), *cert. denied*, 516 U.S. 852, 116 S.Ct. 151, 133 L.Ed.2d 95 (1995), ruled that exigent circumstances could not justify a warrantless search when police created the exigency through their investigative strategies. During undercover operations in *Duchi*, police officers substituted a book for one of two bricks of cocaine in a package picked up by the defendant. Concerned the defendant would be tipped off to police surveillance after discovering the book, officers entered the police officer's home without a warrant and placed the defendant under arrest. The appellate court, in declining to find exigent circumstances, focused on the "reasonably foreseeable consequences" of the officers' decision to substitute the book for the cocaine. *Id.* The court concluded that "[s]ince that danger was created by the officers' investigative strategy, it cannot justify their warrantless entry." *Id.*

Here, as part of their controlled delivery and investigation, police obtained an anticipatory warrant for a search of 332 Grace Street. Repeating for the

moment the argument that the warrant was poorly drafted – (1) it indicated the trailer police intended to search was concealed; (2) the trailer, rather than its contents, constituted evidence of an alleged drug violation; (3) it ordered police to conduct its search "forthwith" rather than conditioned upon the occurrence of an event, *i.e.*, the anticipatory delivery; and (4) it failed to state Lirette lived at the 332 Grace Street residence, which police admitted was owned by Williams – police failed to execute the warrant once the controlled delivery was made.

Despite the authority to execute the search warrant forthwith upon the controlled delivery and presumably detain or arrest Lirette, police allowed him to leave the 332 Grace Street residence with the package. Minutes later, once Lirette entered the 313 residence where the package was ostensibly opened, police entered on the guise of a "protective sweep." It was then that Williams, among others, was detained while officers sought a search warrant for items they observed and believed related to drug activity.[2]

By failing to detain or arrest and execute the warrant at 332 Grace Street upon completion of the controlled delivery, police improperly extended the investigation to create exigent circumstances permitting entry into the 313 Grace Street residence. The government controlled the delivery. Apparently law

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[2] Lt. Danielle LeBouef of the drug task force testified she had no prior knowledge that Williams was involved in the drug trade, *i.e.*, no evidence of surveillance of his properties, and no controlled buys.

enforcement believed it had ample evidence that Lirette would accept the package; it had obtained an anticipatory warrant. Yet, without reason, they decided to delay execution of the warrant which resulted in legal prejudice to Williams. *See Spinelli v. United States*, 382 F.2d 871, 885 (8th Cir. 1967), *revd. on other grounds*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) ("A warrant is issued upon allegation of presently existing facts, and as such does not allow execution at the leisure of the police, nor does it invest the police officers with the discretion to execute the warrant at any time . . . believed by them to be the most advantageous.").

Thus, under the facts of this case, the delay in executing the warrant and in failing to detain Lirette led to the so-called exigent circumstance (protective sweep) at the 313 Grace Street residence. Even after Lirette was allowed to travel to the second location, law enforcement could have (1) arrested him before he entered since he possessed what they believed was illegal narcotics or (2) conducted surveillance while obtaining a warrant. The ability of law enforcement to obtain warrants electronically further weighs against delays merely to benefit an investigation.

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on "actions taken by the police *preceding* the warrantless search." *United States v. Coles*, 437 F.3d 361, 367 (3rd Cir. 2006).

Here, law enforcement allowed a set of circumstances over which they had control to manifest into a warrantless entry on grounds of "protective sweep." The district court improperly found in favor of law enforcement. Officers created, or at least greatly increased, the exigent circumstances due to their investigative strategies. By their replacement and removal strategy, accompanied with the insertion of a beeper into the package, and their failure to execute the anticipatory search warrant, law enforcement manufactured an opportunity to bypass the warrant requirement. Absent greater particularity by the government, reasonable minds cannot agree that the United States proved officers were exposed to a dangerous situation that justified a "protective sweep."

CONCLUSION

Williams is entitled to a certificate of appealability. Reasonable jurists could debate whether the ineffective assistance of Williams's trial attorney in failing to file a motion to suppress contributed to his conviction. Williams demonstrates a substantial showing of the denial of a constitutional right – effective assistance of counsel – with respect to the various issues before the court for consideration. Williams's initial trial attorney did not engage in sound trial strategy. The attempt by his second counsel to file an "after-the-fact" motion and to join in with co-defendants' motion is prima facie evidence that Williams's second counsel believed a motion to

suppress was necessary and could have led to relief for his client.

Respectfully submitted,

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