NO. 21-7344

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EDWIN DAVID CALLIGAN—PETITIONER,

VS.

UNITED STATES OF AMERICA—RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edwin David Calligan #994335
Defendant, *Pro Se*
Indiana Department of Corrections
Pendleton Correctional Facility
4490 W. Reformatory Rd.
Pendleton, IN 46064

QUESTIONS PRESENTED

A panel of the United States Court of Appeals for the Seventh Circuit ruled:

"...[t]he warrant was not anticipatory" because "...[n]o language in the warrant or affidavit conditions probable cause upon that anticipated delivery." **(App. A pg. 5)**.

1) Whether the United States Court of Appeals for the Seventh Circuit decision is in direct conflict with and effectively overruled the United States Supreme Court's decision in United States v. Grubbs, 547 U.S. 90 (2006), which held that the language expressing a triggering event/conditions precedent need not be contained in the warrant itself in order to be a valid anticipatory warrant?;

2) Whether the Fourth Amendment requires law enforcement to return to the warrant—issuing magistrate judge if they alter the triggering event/conditions precedent to an anticipatory search warrant any time after the warrant application has been approved but before the actual servicing of the search warrant?

3) Does the Fourth Amendment allow probable cause to continue to exist for anticipatory search warrant cases, based solely on contraband being mailed to a residence, after the triggering event/conditions precedent fail to occur?

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IN THE
SUPREME COURT OF THE UNTIED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Seventh Circuit is designated at Appendix A. The unpublished decision of the United States District Court for the Northern District of Indiana, Fort Wayne Division is designated at Appendix B. The unpublished recommendation of the United States District Court for the Northern District of Indiana, Fort Wayne Division magistrate judge is designated at Appendix C. The unpublished decision of the United States Court of Appeals for the Seventh Circuit denying a timely Petition for Rehearing and Rehearing *En Banc* is designated at Appendix D.

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit decided my case was August 6, 2021. A copy of that decision appears at Appendix A. A timely Petition for Rehearing and Rehearing *En Banc* was denied by the United States Court of Appeals for the Seventh Circuit on November 9, 2021 and a copy of that decision appears at Appendix D. the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal defendant's constitutional rights guaranteed under the Fourth Amendment. The Fourth Amendment provides in relevant part:

> "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

Petitioner Edwin Calligan was charged with (1) one count of illegally possessing a firearm, having previously been convicted of a felony in violation of 18 U.S.C. § 922(g)(1); (2) one count of importing a controlled substance (5F-—ADB) from Hong Kong to the United States from April to June of 2017, in violation of 21 U.S.C. § 952; and (3) one count of knowingly and intentionally attempting to possess with the intent to distribute a controlled substance in June of 2017 in violation of U.S.C. § 846.

On June 16, 2017, Agent Goehring submitted an anticipatory search warrant request seeking "...[t]o make a controlled delivery of the TARGET PARCEL containing the 5F—ADB. The TARGET PARCEL will be delivered to XXXX Encino Drive, Fort Wayne, Indiana 46816. The search ***will*** be executed ***after*** the TARGET PARCEL has been delivered." After the warrant—issuing magistrate approved of the anticipatory search warrant conditioned on the delivery of the 5F—ADB, Agent Goehring himself, removes ***all*** of the 5F—ADB from the TARGET PARCEL and replaces it with a "sham" material. Agent Goehring did not return back to the Court to allow the Court to determine if probable cause continued to exist based on the altered triggering event/conditions precedent.

On January 23, 2018, Calligan moved the district court to suppress all physical evidence gathered pursuant to a search warrant from a residence on Encino Drive in Fort Wayne, Indiana. The motion to suppress was based on the premise that the warrant, which was issued on June 16, 2017, was anticipatory and that, when the triggering condition—delivery of the TARGET PARCEL containing the 5F—ADB to the residence as prescribed in the warrant affidavit did not occur, probable cause was lacking to enter the residence on June 20, 2017. Instead of contraband, the only substance law enforcement had fair probability to believe would be found in the residence was the "sham" material that the agent placed in the TARGET PARCEL to replace all the contraband he removed.

An evidentiary hearing on the suppression motion was held on March 19, 2018. Special Agent Jonathan Goehring of the United States Immigration and Customs Enforcement, the agent who swore out the affidavit for the warrant, testified at the hearing. The affidavit was admitted into evidence as Defense Exhibit A, and the warrant and return together as Exhibit B. Following the evidentiary hearing, the magistrate judge's Report and Recommendations, made factual findings based on these exhibits and the testimony, that were adopted by the district court.

On June 5, 2017, Agent Goehring received information about the seizure of a parcel containing a fentanyl analog by United States Customs and Border Protection. This parcel was not addressed to Petitioner Calligan or the Encino Drive address. However, on June 12, 2017, a package from the same shipper was seized and found to contain one kilogram of the recently placed on the controlled substance ban list, 5F—ADB. This package (the "TARGET PARCEL") was addressed to Petitioner Calligan for the Encino Drive residence.

The agent's affidavit explained that the TARGET PARCEL and a sealed evidence bag containing the 5F-ADB were shipped to the Indianapolis office for an ***attempted*** controlled delivery to the Encino Drive residence. The agent stated in the affidavit that, while he "...**[b]elieves** there is currently sufficient probable cause for issuance of this search warrant based on the aforementioned facts, it is the intention of your Affiant, working in connection with other law enforcement agents, to make a controlled delivery of the TARGET PARCEL containing the 5F—ADB. The TARGET PARCEL will be delivered to [XXXX] Encino Drive, Fort Wayne, Indiana 46816. The search warrant ***will*** be executed ***after*** the TARGET PARCEL has been delivered." (emphasis added).

Even though the warrant application indicated that the warrant would not be executed prior to the delivery of the actual controlled substance, Agent Goehring claimed at the hearing that he changed this plan after he became concerned for the safety of the officers serving the search warrant if the 5F—ADB was left in the TARGET PARCEL because of Calligan's criminal history, although he included Calligan's criminal history in the affidavit. In its report and recommendations, the Court expressed "concerns" about "...[t]he agent who testified that he had overseen over a hundred controlled deliveries, included Calligan's criminal history in the affidavit; therefore, it is unclear why the concern did not arise at the time of the search warrant application were prepared."

The agent thus made the decision to replace all of the 5F—ADB in the TARGET PARCEL with "sham" material after gaining permission from two (2) AUSA's and not the warrant—issuing magistrate judge. He did not return to the warrant—issuing magistrate judge with an amended warrant application to allow the Court to determine if probable cause still existed with the delivery of the "sham" material and if this change altered his requested triggering event/condition precedent. Agent Goehring offered no reason for his failure to do so. Everyone except for the warrant—issuing judge knew about the "switch." In its report and recommendations, the Court

expressed "concerns" about the agent's failure to return to the Court and reiterated that, "Second, even though the agent believed that there was probable cause for the search without the delivery of the Target Parcel, the Court—not law enforcement—determines probable cause..."

At the motion to suppress hearing, Agent Goehring testified that he had not requested an anticipatory search warrant but rather a traditional warrant but agreed that "...[t]he plan was S.W.A.T. was there [at the Encino Drive residence] and prepared to go [inside to execute the search warrant] immediately after the delivery of the package"... "***If the package went inside.***"

The search warrant return, filed with the warrant—issuing magistrate contained an inventory list indicating that "1 international parcel containing 1 kg of 5F—ADB" was seized from the Encino Drive residence. Despite being the same officer who made the decision to replace the 5F—ADB with a "sham" material, Agent Goehring testified that he "made a mistake" in preparing the return despite knowing that the actual controlled substance was not recovered during the search. In its report and recommendations, the Court expressed "concerns" that "...[t]his error occurred in light of the agent's preparation of the search warrant affidavit, decision to replace all the 5F—ADB with sham, and preparation of the sham substance."

Following additional briefing after the hearing, the magistrate judge issued a report and recommendations, finding that based on United States v. Grubbs, 547 U.S. 90 (2006) the requested search warrant was not an anticipatory warrant due to, "...[t]he Court finds that the warrant was not conditioned on the delivery of the Target Parcel..." and basically because the agent testified that he had not requested an anticipatory warrant. Calligan objected to this finding but the district court adopted it and denied the motion to suppress.

Calligan proceeded to trial on January 21, 2020. During testimony, three different S.W.A.T team members all testified under oath that the execution of the search warrant was directly contingent on the delivery and acceptance of the TARGET PARCEL. Following trial, Calligan was convicted of all charges. On May 13, 2020, Calligan was sentenced to a total term of imprisonment of 210 months. The judgment was entered on May 13, 2020. Calligan filed a timely notice of appeal on May 14, 2020.

Three short days after oral arguments and after too citing United States v. Grubbs, 547 U.S. 90 (2006) in the decision, the United States Court of Appeals for the Seventh Circuit echoed the magistrate judges finding that the warrant in the case under review was not anticipatory because there was

"...[n]o language in the warrant or affidavit" that "conditions probable cause upon that anticipated delivery."

Calligan filed a timely Petition for Rehearing/Rehearing *En Banc* arguing that the panel decision was in direct conflict with and effectively overruled the United States Supreme Court's decision in United States v. Grubbs, 547 U.S. 90 (2006) and the United States Court of Appeals for the Seventh Circuit's long—standing precedent handed down by a panel of its Court in United States v. Dennis, 115 F.3d 524 (7th Cir. 1997). Both Court's decisions hold that the language expressing a condition precedent need not be contained on the face of the warrant itself in order to be considered a valid anticipatory warrant. The Petition for Rehearing/Rehearing *En Banc* was denied on November 9, 2021.

On January 24, 2022, Justice Barrett, extended the time file the petition for writ of certiorari until March 9, 2022.

This petition for a writ of certiorari ensues.

REASONS FOR GRANTING THE PETITION

ARGUMENT I(A).

As set forth in United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 14, 94 L. Ed. 2d 195 (2006):

> **"Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed. The language of the Fourth Amendment is likewise decisive here; its particularity requirement does not include the conditions precedent to execution of the warrant. "**
>
> **"The Fourth Amendment's particularity language-requiring a warrant 'particularly describing the place to be searched, and the persons or things to be seized'-did not include the conditions precedent to execution of the warrant."**

Id at 90.

The million dollar question in this case boils down to: Was the requested warrant in this case traditional or anticipatory? This is a model case to show courts and officers the difference between the two. The clear difference between the two is that with a traditional warrant police "seek permission to search a house for an item they believe *is already located there,*" whereas with an anticipatory warrant police "seek permission to search for an item they believe *will be located there* once specified events occur." United States v. Penney, 576 F.3d 297, 311 (6th Cir. 2009) citing

Grubbs, 547 U.S. 95 (2006). Here, officers sought to execute a search warrant after the controlled delivery of a TARGET PARCEL containing 5F-ADB—once specified events occurred.

Three short days after oral arguments, in a precedent—setting error, a panel of the United States Court of Appeals for the Seventh Circuit denied relief holding that the warrant in the case under review was not anticipatory solely because there was "...[n]o language in the warrant or affidavit that conditions probable cause upon that anticipated delivery." (App. A pg. 5). This ruling is in direct conflict with and effectively overrules this Court's precedent—setting decision rendered in United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 14, 94 L. Ed. 2d 195 (2006).

It is first noted that the panel describes the controlled delivery as "anticipated" however, found that it was not an anticipatory search warrant. Ironically, the panel cites this Court's Grubbs decision, which makes it unmistakably clear that the Fourth Amendment does not require the triggering event/conditions precedent to an anticipatory search warrant to be set forth in the warrant itself in order to be a valid anticipatory warrant. This ruling is clear, concise and allows no room for misinterpretation. This case does not involve a factual dispute. The fact that this warrant did not

expressly condition the search upon the controlled delivery of the TARGET PARCEL is not dispositive.

In Grubbs, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision concluding that "...[t]he warrant at issue here ran afoul of the Fourth Amendment's particularity requirement." United States v. Grubbs, 377 F.3d 1072 (9th Cir. 2004). Specifically, that United States Appeals Court invalidated the anticipatory search warrant at issue in that case because the warrant failed to specify the triggering condition on the face of the warrant. However, this Court reversed the United States Court of Appeals for the Ninth Circuit's ruling holding that the absence of the triggering conditions being stated on the face of the warrant did not violate the Fourth Amendment. United States v. Grubbs, 547 US 90, 126 S.Ct. 14, 94 L. Ed. 2d 195 (2006).

The deciding panel held Calligan to a higher and double standard, rendering it virtually impossible to receive a fair review of this issue on appeal. Had Calligan argued that the warrant was invalid due to the warrant not stating the triggering event/conditions precedent, the panel would have lawfully denied relief based on this Court's decision rendered in Grubbs, 547 U.S. 90 (2006). Had the triggering event/conditions precedent been omitted from the warrant but were precisely followed pursuant to the specifications

contained in Agent Goehring's affidavit (as in Grubbs, 547 U.S. 90), his conduct would have been found in accordance with clearly established law.

But here, Agent Goehring did not precisely follow the triggering event/conditions set forth in his own authored affidavit. Respectfully submitted, the United States Court of Appeals for the Seventh Circuit read Grubbs, 547 U.S. 90 as holding that when the triggering event/conditions precedent are followed by the officer before the search warrant is executed, they need not be stated on the face of the warrant. However, when the officer does not adhere to his/her own triggering event/conditions precedent (or there is a dispute as to what type of warrant was requested), then the triggering event/conditions precedent must be present on the face of the warrant in order to be a valid anticipatory warrant. This directly contradicts and undermines this Court's Grubbs rationale.

It is frustrating that the magistrate judge, district court, government (on both levels), and reviewing panel all cited this Court's Grubbs decision but still argued and held that the warrant under review was not anticipatory, solely due to the face of the warrant not containing a triggering event/conditions precedent on its face, when this controlling case (Grubbs, 547 U.S. 90 (2006)) clearly states that an anticipatory warrant is still valid in the absence of the triggering event/conditions precedent on the face of the

warrant. It is as if no reviewing authority actually read these cases but only copied and pasted a certain line from the government's initial brief in response at the district court level. If this case were actually reviewed, then the magistrate judge, district court and reviewing panel did not just simply get it wrong, all ignored, disregarded and overruled clearly established federal law of this Court in order to avoid granting suppression in this case.

In order to avoid having grant suppression, each Court had to find that it was not an anticipatory search warrant the agent applied for. Simply after reading the warrant application, any jurist of reason would conclude that the requested warrant was clearly anticipatory in nature. (App. E. pg. 36-50). Oddly, at no time was it argued or found that the triggering event/conditions precedent had occurred as prescribed in the warrant application; just that "...[d]elivery of the actual drugs to Calligan was not a triggering condition." (App. A pg. 5).

By going against this Court's clear and concise decision in Grubbs, the Courts—below showed a lack of respect for this Court's adjudicatory process and the stability of the United States Supreme Court's decisions. There is no case that allows any federal appeals court to overrule any precedent decision rendered by the United States Supreme Court, which was blatantly done in the case under review.

ARGUMENT I(B).

As for the panel's contention that there was "...[n]o language in the affidavit that conditioned probable cause upon that anticipated delivery," therefore, it cannot be an anticipatory warrant, this finding too is in clear error for the following two reasons: (1) The affidavit most definitely did contain language establishing a triggering condition and it was fulfilled (albeit after being made void) before Agent Goehring gave the order to execute the search warrant; and (2) The Fourth Amendment does not require precise language for triggering conditions.

First and foremost, neither the magistrate judge, district court nor panel of the United States Court of Appeals for the Seventh Circuit provided any governing law that states that a precise phrase or language must be used in the affidavit when requesting an anticipatory search warrant. Why? Because there is none.

Nearly 25 years ago, the United States Court of Appeals for the Second Circuit's decision in United States v. Moetamedi, 46 F.3d 225, 228-29 (2nd Cir. 1995) held, "...[a]n anticipatory warrant need not state on its face the conditions precedent for its execution if the warrant affidavit contains 'clear, explicit and narrowly drawn' conditions and the executing officers actually satisfy those conditions before executing the warrant." This rationale was

also accepted and adopted by the United States Court Of Appeals for the Sixth, Seventh (United States v. Dennis, 115 F.3d 524 (7th Cir. 1997)), Eighth and Tenth Circuits (other citations omitted).

The reality that the warrant under review is unambiguously an anticipatory search warrant can be found in the following four different stages of the proceedings: (1) The warrant affidavit; (2) Agent Goehring's testimony during the motion to suppress hearing; (3) Agent Goehring's actions during the servicing of the search warrant; and (4) The testimony of three different SWAT team members whom executed the search warrant.

Firstly, it is stated in the affidavit that, "HIS Special Agent Eric Radakovitz shipped the TARGET PARCEL along with a sealed evidence bag containing the 5F-ADB to HIS Indianapolis for an ***attempted*** controlled delivery." (App. E pg. 45). (emphasis added). The mere mention of the language "controlled delivery" alerted the issuing magistrate and the reviewing panel, that an anticipatory search warrant was being requested. United States v. Lora—Solano, 330 F.3d 1288, 1292 (10th Cir. 2003) ("An anticipatory search warrant, such in this case, is valid when the warrant application indicates there will be a government—controlled delivery of contraband to the place to be searched..."). Combined with the fact that the issuing magistrate knew the 5F—ADB was in the possession of Agent

Goehring at the time of the warrant application and not in the residence to be searched. "Anticipatory warrants are peculiar to property in transit. Such warrants are issued in advance of the receipt of particular 'property' (usually contraband)..." United States v. Leidner, 99 F.3d 1423, 1425 (7th Cir. 1996).

It was also stated in the affidavit that, "The TARGET PARCEL ***will*** be delivered to [XXXX] Encino Drive, Fort Wayne, Indiana 46816. The search warrant ***will*** be executed ***after*** the TARGET PARCEL has been delivered..." (emphasis added). (App. E pg. 49). Here, the use of future—tense, rather than past or present—tense, language in the affidavit indicates the anticipatory nature of the warrant. Read in a commonsense fashion, the affidavit's conditions precedent are specific and clear—the search ***will*** be executed only ***after*** the TARGET PARCEL has been delivered. Despite the panel finding that the warrant in the case under review was not anticipatory because there was "...[n]o language in the warrant or affidavit that conditions probable cause upon that anticipated delivery," this is undeniably triggering event language. United States v. Perkins, 258 F. Supp. 3d 868, 876 (TENN E.D. 2017) ("triggering event set forth in the affidavit must be read in a commonsense fashion that avoids hyper—technical construction").

As defined in Webster's Dictionary, the word "will" is defined in part as expressing futurity and inevitability. "A warrant is anticipatory if it takes

effect, not upon issuance but a specified time." (i.e. "***after*** the TARGET PARCEL has been delivered"). United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994). Here, the warrant did not command an immediate search of the residence nor did Agent Goehring's affidavit. In United States v. Hernandez—Rodriguez, 352 F.3d 1325, 1331 (10th Cir. 2003), the United States Court of Appeals for the Tenth Circuit agreed with the district court's finding that, "...[t]he last sentence of the affidavit, which contained the words 'when delivery is made by Detective Kechter,' set forth the condition precedent."

Secondly, Agent Goehring's testimony during the motion to suppress hearing is more than sufficient proof that the warrant he requested is most definitely an anticipatory search warrant. When asked about his prior experience with anticipatory search warrants, he stated that he has done over "100 of them" and that, "That's a warrant that's contingent on something happening before it's a valid search warrant. The ones that I have done, it's that the drugs enter the house first." (MTS p.30 at 2; p.20 at 6-8)[1]. "Anticipatory warrants are designed for this precise situation—an immediate

[1] Appellate attorney, Beau B. Brindley failed to reference this testimony in the initial brief for the panel's consideration.

search upon completion of a controlled delivery." United States, v. Kazuyoshi—Iwai, 930 F.3d 1141, 1149 (9th Cir. 2019).

The most damaging under oath testimony to his claims that he had not requested an anticipatory search warrant can be found in his response in the following colloquy:

> **Q:** The plan was S.W.A.T. was there and prepared to go immediately after the delivery of the package, is that fair?
>
> **A:** If the package went inside.

(MTS p. 37 at 12-14)[2]. His response "***If the package went inside***" is direct evidence that he would not have given the order to execute the search warrant had the TARGET PARCEL not been delivered or taken into the house—hence an anticipatory search warrant that was conditioned upon the delivery of the 5F—ADB.

Thirdly, Agent Goehring's actions during the servicing of the search warrant also indicate that it was always intended as an anticipatory search warrant, despite his later dishonest testimony to the contrary. When asked by the magistrate judge, "And where is the SWAT team then? I mean are they nearby waiting?" (MTS p.36 at 3-4). Agent Goehring responds, "No, they're not watching but they're nearby." (MTS p.36 at 5-6). Evidence that

[2] Appellate Attorney, Beau B. Brindley failed to reference this testimony in the initial brief for the panel's consideration.

SWAT would only be called to execute the search warrant, "***If the package went inside.***"

Additional testimony of Agent Goehring mandates that it be an anticipatory search warrant due to the fact that he did not allow the warrant to be served until ***after*** the package was delivered. (MTS p.11 at 15-17; p.37 at 20-21; p.37 at 12-14). He further testified, "Yes, the postal inspector or the person watching from the front said the package went in the house, and that's when I gave the order for SWAT team to execute the warrant" (MTS p.36 at 23-25). The fact that he ***immediately*** ordered the warrant served adds weight to the fact that the warrant was anticipatory as he did not delay the execution for any amount of time, in order to see if the package would be moved to a different location. "In sum, the officers behaved precisely as they would have if they had obtained an anticipatory search warrant...They watched *Iwai* take the package into his apartment...then immediately sent their team into the apartment." Iwai, *supra,* at 1153.

Here, Agent Goehring's affidavit, by his own instructions set forth a triggering event/conditions precedent, the issuing magistrate accepted those conditions and Agent Goehring waited until his authored conditions had been actually satisfied before ***he*** gave the order to execute the search, on a warrant made void. Therefore, Agent Goehring complied with the directives sworn

under oath to in his warrant application, thereby making the warrant anticipatory. Dennis and Moetamedi, *supra.*

Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty. The totality of the facts, circumstances, and previous legal conclusions clearly exhibit an anticipatory warrant.

Lastly, during trial, three officers of the SWAT team (Officer Kramer, Officer Bleeke, and Officer Loubier) whom participated in the execution of the search warrant testified under oath that in their pre-delivery meeting, it was established that the package must be delivered before the search warrant could be executed[3] (emphasis added). Proof that the execution of the search warrant was dependent on the delivery of the package. This is contrary to the Agent Goehring's motion to suppress testimony that he had not applied for an anticipatory search warrant and outweighs his credibility three—to—one. "The court may consider trial testimony in reviewing a pre-trial suppression." United States v. Howell, 958 F.3d 589, 596 (7th Cir. 2020).

[3] Appellate Attorney, Beau B. Brindley failed to reference this testimony in the initial brief for the panel's consideration. Also, the three SWAT team member's testimony is not referenced to in the record due to Petitioner Calligan not having access to the trial transcripts.

Justice Souter stated in the concurring opinion of Grubbs:

> **"But when the government officer obtains what the magistrate says is an anticipatory warrant the agent must know or should have realize when it omits the condition on which authorization depends, and it is hard to see why the government should not be held to the conditions despite the unconditional face of the warrant."**

Id at 101.

Even in the near impossible scenario that the warrant—issuing magistrate mistakenly issued the wrong warrant, Agent Goehring is not relieved of the conditions he requested and set forth in his affidavit. "Just because the warrant 'might have' been formulated differently does not relieve an agent of the triggering conditions specified in his affidavit." United States v. Perkins, 258 F. Supp. 3d 868, 877 (TENN E.D. 2017).

As set forth in United States v. Grubbs, 547 U.S. 90 (2006):

> **"The Fourth Amendment does not require any precise language for triggering conditions only that the amendment specifies that the warrant must only: 'particularly describe the place to be searched and the person or things to be seized.'"**

Id at 97.

The panel's contention that because the affidavit is absent of the language "*not occur unless and until*" or "*if and only if,*" it cannot be an anticipatory search warrant is in clear error. (App. A pg. 6). Again, the panel held Calligan to a higher standard and one that is not required under the

Fourth Amendment. "While no specific words are necessary to create a condition precedent, words such as 'if,' 'provided that,' 'when,' '***after***,' 'soon as,' or 'subject to,' are words recognized as those that traditionally indicate conditions." Standefer v. Thompson, 939 F.2d 161, 164 (4th Cir. 1991) (emphasis added). All Courts below cited Grubbs and Dennis, which upheld anticipatory warrants that described the triggering event in seemingly more precise and explicit terms. But it cites no decision holding that an anticipatory warrant authorizing a search upon "delivery" of a package is constitutionally invalid. Hernandez—Rodriguez, *supra* at 1332.

In Rey, the Court of Appeals for the Sixth Circuit held, "A reasonable inference can be made that the warrant authorizes a search only after the controlled delivery has occurred. If the controlled delivery had not occurred, then the warrant would have been void." United States v. Rey, 923 F.2d 1217, 1221 (6th Cir. 1991). Furthermore, the affidavit is devoid of any statement that the warrant would still be served in the event the TARGET PARCEL was not delivered or accepted. There's one question never seemed to be asked or considered: If Agent Goehring truly applied for an traditional warrant and probable cause existed without the delivery of the TARGET PARCEL; why go through all of the trouble to remove ***all*** of the 5f—ADB, conduct a controlled

delivery and go through the trouble to submit a falsely fashioned return? Why not just execute the warrant?

ARGUMENT II.

The United States Supreme Court has not previously addressed the issue of whether the Fourth Amendment requires officers to return to the warrant—issuing magistrate judge if they alter the triggering event/conditions precedent to an anticipatory search warrant any time after the warrant application has been approved but before the actual servicing of the search warrant[4]. Does the officer incur a constitutional duty to seek the magistrate's determination anew of whether probable cause still exists in this event? As anticipatory search warrants are becoming a routine part of everyday policing tactics, this Court should address and instruct courts and officers on how the Fourth Amendment requires them to act in accordance with the law on this matter.

At least one federal court of appeals has held that[5]:

> **"...[o]fficers charged with executing a warrant have a duty to report new or correcting information to the magistrate judge if the information is received after the warrant has been signed**

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[4] Neither has the United States Court of Appeals for the Seventh Circuit.

[5] The United States Court of Appeals for the Fourth Circuit disagrees holding, "...[a]n officer in this circuit that has already signed a sworn affidavit and presented it does not have a duty to alert a magistrate to any intervening exculpatory facts material to probable cause." Safar v. Tingle, 859 F.3d 241, 247 (4th Cir. 2017).

but before its execution and would be material to the magistrate's determination of probable cause."

"It is the neutral magistrate, not the executing officer who determines whether probable cause continues to exist."

United States v. Marin—Buitrago, 734 F.2d 889, 894-95 (2nd Cir. 1984). Here, after swearing under oath that he would only execute the warrant after the delivery of the 5F—ADB, Agent Goehring removed ***all*** of the 5F—ADB, replaced it with a "sham" material and still executed the warrant although he knew that this was not the triggering event/conditions precedent that the warrant—issuing judge approved of. This new information is material due to the warrant—issuing judge finding that the 5F—ADB entering the residence established probable cause—not a "sham" material entering the residence.

The warrant—issuing judge could have rightfully determined that delivering a box full of a "sham" material did not give rise for probable cause to believe that the controlled substance of 5F—ADB would not be found in the residence after the search. "Probable cause is established when, considering the totality of the circumstances, there is 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 (1983). Due to the complete absence of prior criminal activity connected to the residence (discussed below), more could have been legally required, such as requiring the delivery of ***all*** or a

representative amount of the 5F—ADB to establish probable cause. Even at the district court level, the government admitted that, "...[t]he agent should have left a small amount of the 5f—ADB inside the package or return to the Court to request an amended warrant after replacing the 5F—ADB with sham material." (Case No. 1:17-cr-51, DE#79 pg. 15). In every anticipatory search warrant case on record, where an officer has either removed some or all of the contraband, the officer alerted the Court in the submitted affidavit[6].

Showing further disregard for the law, Agent Goehring did not return to the Court in order to seek the magistrate's probable cause determination anew to allow the Court to determine if probable cause still existed with the delivery of the "sham" material. The Fourth Amendment's protection against unreasonable searches and seizures would be an incomplete and highly manipulable safeguard is a neutral magistrate could not play the same impartial role in assessing continuing probable cause that he/she plays in determining probable cause to issue the warrant in the first place. "Judges

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[6] "State Trooper Steven Nesbit applied for a warrant authorizing police to, *inter alia*: (a) remove the cocaine and replace it with fake drugs; (b) deliver the package to Defendant's residence..." United States v. Santana, 2020 U.S. Dist. LEXIS 38086 (3rd Cir. M.D. Pa); "The bricks of cocaine were replaced with bags of sugar and a sample of approximately two grams of cocaine." United States v. Rey, 923 F.2d 1217, 1218 (6th Cir. 1991); and "Officer Miner then applied to an Alaska State Court judge for a contingent search warrant authorizing delivery of the package containing the sham drugs..." United States v. Rosario, 2017 U.S. Dist. LEXIS 32995 (9th Cir. D. Alaska).

cannot leave it to law enforcement to manipulate the triggering event after the issuance of the warrant." United States v. Perkins, 887 F.3d 272, 275 (6th Cir. 2018). Decades ago, a Court foresaw this exact type of problem with anticipatory warrants holding, "...[i]ndeed, we recognize that any warrant conditioned on what may occur in the future presents some potential for abuse." United States v. Garcia, Would it be allowed to request the execution of a search warrant after a delivery of a controlled substance but after its approval, the officer removes the controlled substance and replaces it with a stolen handgun?

Agent Goehring's actions are the equivalent of taking the probable cause determination out of the warrant—issuing magistrate's hands and making that determination for himself, which the Fourth Amendment forbids. Since at least 1948, this Court has held the same stance that, "...[i]t is the position of a neutral magistrate, not the executing officer that determines probable cause." Johnson v. United States, 333 U.S. 10, 14 (1948). The failure to alert the warrant—issuing magistrate of the "switch" alone requires suppression if only to deter future constitutional violations of officers. *See* United States v. Ricciardelli, 998 F.2d 8, 16 (1st Cir. 1993)("Although the failure to correct evident defects is itself sufficient to support suppression here...").

The magistrate judge's report and recommendations stated, "...[t]he Court is concerned by three aspects of events identified by Calligan in his briefs, worthy of noting here." Specifically:

> **"Second, even though the agent believed that there was probable cause for the search without the delivery of the Target Parcel, the Court—not law enforcement—determines probable cause." *see* Johnson v. United States, 333 U.S. 10, 14 (1948), and it appears that the agent had sufficient time to return to the magistrate judge to present the change in circumstances regarding the removal of the 5F—ADB from the Target Parcel and obtain a search warrant based on the changed facts."**

(App. A pg. 32-33).

As this warrant was served at 11:15am on a Tuesday during the course of a normal working day, there was no reason why the agent could not have contacted the Court prior to the serving of the search warrant. In fact, when asked, Agent Goehring offered no explanation as to why he did not. (MTS pg. 12 at 18-25). There were no exigent circumstances that would have allowed the servicing of the warrant. He could have easily phoned the magistrate judge. *See* Fed. R. Crim. P. 41, which describes the procedure for obtaining a warrant by telephone. "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." United States v. Alvarez, 810 F.2d 879, 884 (9th Cir. 1987). Agent

Goehring contacted not one but two AUSA's but decided specifically not to return to the Court based on their—not the Court's decision that the "switch" maintained sufficient probable cause.

Even in the event the magistrate judge was not available at the time, Fed. R. Crim. P. 41(c) allows 10 days for the servicing of a warrant. The application was granted on June 16, 2017 with it being serviced on June 20, 2017. So, there was plenty of time for Agent Goehring to go back to the Court with his concerns about delivering the package with the controlled substance inside. If Agent Goehring is excused from his constitutional duty of presenting probable cause altering information to a magistrate judge, it is difficult to think of a case/situation in which it would be required.

To add insult to injury, and in continuous pattern of deceit upon the Court, Agent Goehring testified that after learning of Calligan's criminal history, he made the decision to replace the 5F—ABD with a "sham" material. (MTS pg. 12 at 14). This testimony is of a dubious nature as there is absolutely no correlation whatsoever between Calligan's alleged history and the agent's decision to use a "sham" material. As he failed to alert the Court that he was using a "sham" material, and the reason for its use, this is evidence of a *post hoc* justification, which should not be considered as truthful.

On page 9 of the search warrant affidavit, Calligan's history is stated in full detail. (App E pg. 44). Therefore, this information was known to the Agent Goehring at the time he applied for the search warrant, it was not information that he learned after the application was made, which he admits. (MTS pg. 30 at 11-14). This led to the magistrate judge's first of his three "concerns" as stated in the report and recommendations:

> **"First, the agent testified that he decided to remove all of the 5F—ADB from inside the Target Parcel and replace it with a sham substance for the controlled delivery based on Calligan's violent criminal history and the agent's concern for the safety of the officers serving the search warrant. (Tr. Pp. 11:21-12:25). While a valid concern, the agent who testified that he had overseen over a hundred controlled deliveries, included Calligan's criminal history in the affidavit; therefore, it is unclear why the concern did not arise at the time of the search warrant affidavit and application were prepared."**

(App. A pg. 32).

"If our system of justice was set up so that officers had the final decision regarding the existence of probable cause, there would be no need for a neutral and detached magistrate's review." United States v. Perkins, 887 F.3d 272 (6th Cir. 2018). That is the requirement of under the United States' Constitution and it is this agent's actions in deciding that he had the power alone to make that determination which demands that this Court accept this writ of certiorari and subsequently suppress the evidence found as a result of this search. Agent Goehring and both AUSA's were trying to usurp the power

of the Court by making their own probable cause determinations based on information far different from what was provided to the warrant—issuing magistrate judge in his initial determination of probable cause. How was it that everyone (2 AUSA's, S.W.A.T. team, and delivery person) except the warrant—issuing magistrate new about the "switch?" (MTS pg. 12 at 14-17; 40 at 4-5).

In cases as egregious as what is now before the Court, the Court should exercise its great discretion and take the extreme step of suppression of the evidence to prevent law enforcement from taking into its own hands the decision of when probable cause exists. That is and must continue to be the domain of a neutral and detached magistrate.

ARGUMENT III.

Anticipatory search warrants are generally applied for to conduct searches triggered after police deliver contraband in a police—controlled delivery of the contraband when there is little or no evidence connecting the place to be searched with evidence of a crime other than the contraband to be delivered. United States v. Penney, 576 F.3d 297, 311 (6th Cir. 2009). And "...[i]f 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 been satisfied when the warrant is issued." United States v Grubbs, 547 U.S. 95 (2006).

For an anticipatory warrant based on a triggering event/conditions precedent, this Court requires satisfaction of two "prerequisites of probability" to comply with the Fourth Amendment's probable cause requirement. Grubbs, 547 U.S. at 96. The first prerequisite of probability requires that, "...[b]ased on facts existing when the warrant is issued, there is probable cause to believe the contraband, which is not yet at the place to be searched, will be there when the warrant is executed." Grubbs, 547 U.S. at 96-97.

As the "...[t]riggering event set forth in the affidavit must be read in a commonsense fashion that avoids hyper—technical construction," Perkins, 258 F. Supp. 3d 876, there was no probable cause to believe that 5F—ADB would be found in the residence via the TARGET PARCEL once it was delivered—only a "sham" material. With the removal of ***all*** of the 5F—ADB from the TARGET PARCEL, the factual and practical considerations of everyday life on which reasonable and prudent men/woman, not technicians, would find probable cause to believe any5F—ADB would be found in the

premises once the TARGET PARCEL was delivered. Thereby, failing to meet the Fourth Amendment's first requirement.

The second prerequisite of probability is that "...[t]here is probable cause to believe that the triggering event will actually occur." Grubbs, 547 U.S. at 97. Here, commonsense allows any reasonable person to determine that the triggering event/conditions precedent (delivery of the TARGET PARCEL containing 5F—ADB) would not occur with the delivery of a "sham" material.

Here, the Courts—below committed clear error in finding that "...[t]here was probable cause without the delivery of the actual drugs." (App. A pg. 6). This determination was found due to: (1) "Agent Goehring's affidavit establishing that a shipper who had sent illegal drugs to other addresses sent a package to the house, addressed to Calligan, containing a distribution quantity of a controlled substance."; (2) "Calligan's car had been parked at the house and he had recently received other international deliveries there."; and (3) "Finally, Agent Goehring opined that, in his experience, drug traffickers often keep drugs, records, packaging supplies, cash and guns where they live..." (App. pg. 6-7). However, none of these cited things creates probable cause without the delivery of the actual 5f—ADB.

Firstly, the only thing that separates Calligan's case from Grubbs is the item to be seized. The panel found probable cause due to "...[a] shipper who had sent illegal drugs to other addresses sent a package to the house addressed to Calligan containing a controlled substance[7]." The defendant in Grubbs "...[p]urchased a videotape containing child pornography from a Web site operated by an undercover postal inspector." Id at 92. In Grubbs, the sender was a known provider for child pornography as it was a sting operation by law enforcement while in Calligan's case it was assumed based on the initial confiscation of contraband not sent to Calligan.

This Court recognized that, "...[t]he occurrence of the triggering condition—successful delivery of the video tape to Grubbs' residence—would plainly establish probable cause for the search." Id at 97. But what if the defendant in Grubbs never accepted the videotape, thus rendering the warrant void? Would this Court still have found probable cause to exist without the delivery of the videotape solely because the sender sent child pornography previously, to others in its sting operation? This is what happened in the case under review.

If the Fourth Amendment allowed for searches of homes solely based upon contraband being shipped to a residence, there would be no need for

[7] The affidavit refers to one prior address—not multiple "addresses."

anticipatory warrants. Finding a way to prevent suppression, the panel made its own probable cause determination that was not in accordance with the Fourth Amendment, which is in clear error. "A reviewing court may not conduct a *de novo* review of a probable cause determination." Illinois v. Gates, 462 U.S. 213, 236 (1983).

Secondly, the panel for the United States Court of Appeal for the Seventh Circuit incorrectly found that "Calligan's car had been parked at the house..." However, when reading the affidavit it clearly says, "...[o]fficers observed the same 1977 that had been driven by CALLIGAN parked in the drive way..." (App. E pg. 44). However, the affidavit conveniently fails to mention that this vehicle was not registered to Calligan (or anyone else) but identifies a registration plate number. Moreover, this does not establish probable cause that evidence of a crime would be connected to that residence.

"A suspect's mere presence or arrest at a residence is too insignificant a connection with that residence to establish that relationship necessary to a finding of probable cause." United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006).

As far as Calligan having "...[r]ecently received other international deliveries there," there is absolutely no evidence presented that these packages were from the same shipper or contained any type of contraband.

Lastly, the vast majority of the affidavit is about the agent's training, experience and beliefs. If the mention of the controlled delivery of the 5F—ADB is removed from the affidavit, it would be "bare bones" and no warrant—issuing magistrate judge would be tempted to issue a warrant based off of what was left.

It is a proposition well settled that a warrant may not issue upon a sworn allegation that an officer "...[h]as cause to suspect and does believe" that illegal activity is taking place upon a specified premises. More must be alleged. Nathason v. United States, 290 U.S. 41 (1933). An agent's "beliefs" are not sufficient to demonstrate personal knowledge. Furthermore, the agent's own statements that he, "...[i]s currently investigating ***possible*** violations..." clearly demonstrates suspicion—not facts or personal knowledge. (App. E pg. 38).

The agent's use of the phrase "***I believe***" (without any tangible or credible testimony) to introduce what he incorrectly believes are factual references, are not facts that the Courts—below could have legally relied on to support probable cause. Rather, this statement only states mere beliefs, hunches and speculative opinions. Again, the vast majority of the affidavit is about the agent's training, experience and beliefs.

Prior to making the application for the search warrant, Agent Goehring admitted surveillance at the Encino Drive residence failed to show evidence of narcotics trafficking. (MTS pg. 16 at 2-5). There were no controlled buys from inside the residence. No trash pulls conducted that produced evidence of criminal activity. No testimony from a credible source stating he/she had personally witnessed criminal activity inside of the residence. The mention of a (successful) controlled delivery in the affidavit is the only statement that places contraband into the premises at any time and this failed to happen with the delivery of the "sham" material. Without the delivery of the actual 5F—ADB, there is no probable cause to believe the residence would contain evidence of illegal activity once the TARGET PARCEL was delivered. "Had the only evidence been that the duffel bags were being delivered to the apartment, the scope of the search, described in the warrant might have been overbroad." United States v. Garcia, 882 F.2d 669, 704. (2nd Cir. 1989). Remove the mention of the controlled delivery from Agent Goehring's affidavit and it will be completely devoid of any criminal activity linked to the residence.

"As a general matter, failure to comply with an anticipatory warrant's triggering event voids the warrant." United States v. Perkins, 887 F.3d 272 (6th Cir. 2018). Here the delivery of the 5F—ADB was the triggering event

that established probable cause. This is why Agent Goehring falsely fashioned the return warrant to show that "1 kilogram of 5F—ADB was retrieved from the home, via the search, when only a "sham" material was delivered[8]. Once the "switch" occurred, the warrant was made void and executed without a reason to believe that the package containing the 5F—ADB would be located in the residence. United States v. Schwarte, 645 F.3d 1022, 1028 n6 (10th Cir. 2011).

The district court and reviewing panel both committed clear error in finding that there was probable cause without the delivery of the actual drugs. (App. A pg.6). First and foremost, as this is an anticipatory warrant, the triggering event (delivery of the 5F—ADB) is what would have established probable cause—nothing else. Secondly, neither has cited any anticipatory warrant case, where there was a controlled delivery, that held even in the event the triggering event did not occur, probable cause still existed. If that was the case, there would be no need to ever attempt a controlled delivery of any contraband. Lastly, if the mention of the controlled

[8] Which was the third concern noted by the magistrate judge in the report and recommendations: "Third, the search warrant return dated June 20, 2017, includes on the numbered inventory list '1 international parcel containing 1 kg of 5F—ADB.' (Ex. B). Recognizing that the agent made a mistake and took responsibility for his mistake at the hearing, the Court is nevertheless concerned that this error occurred in light of the agent's preparation of the search warrant affidavit, decision to replace all the 5f—ADB with sham, and preparation of the sham." (App. Pg.).

delivery is removed from the affidavit, there is nothing left which places contraband in the residence in the past, present or future.

To support their finding of probable cause without the triggering event occurring, the panel cites three cases. However, all three are very distinguishable from the instant case as Dessart did not argue the triggering event of the anticipatory warrant did not occur, nor was it disputed as to what type of warrant was requested or issued. United States v. Dessart, 823 F. 3d 395 (7th Cir. 2016). Enters United States v. Delgado, 981 F. 3d 889 (11th Cir. 2020)[9] and United States v. Orozco, 576 F. 3d 745 (7th Cir. 2009), but in neither one was an anticipatory warrant requested or a controlled delivery attempted before the servicing of the warrant. For the panel to rely on and compare these three cases is tantamount to comparing apples to oranges. There is simply not a case with the same set of facts or circumstances. Another reason for granting certiorari.

It is abundantly clear that Agent Goehring not only understands what an anticipatory warrant is, he requested an anticipatory warrant in this case that was dependent on the delivery of the 5F—ADB. But for some unknown reason, he removes ***all*** of the 5F—ADB and replaces it with a "sham"

[9] Delgado is further distinguishable as the same shipper sent illegal contraband to the same residence twice—not once as in the case under review.

material, rendering the warrant void. Agent Goehring himself made the decision not to comply with his own conditions precedent. "In other words, law enforcement needs to say what it means and mean what it says when proposing a triggering condition as part of an anticipatory warrant." United States v. Perkins, 887 F.3d 272 (6th Cir. 2018).

When it was discovered that he had not abided by his own conditions precedent, when confronted, Agent Goehring gave a dishonest, under oath statement to avoid suppression of the evidence seized. This is the exact type of conduct the exclusionary rule aimed to curve.

NO GOOD FAITH EXCEPTION

Lastly, the United States Court of Appeals for the Seventh Circuit committed clear error in deciding, "Finally, even if probable cause technically were lacking, Agent Goehring's good faith would make the evidence admissible." (App. A pg. 7).

At least one federal court of appeals has ruled:

> **"If a situation arises in which officers wrongly conclude that the triggering event needed to animate an anticipatory warrant has occurred and proceeded to execute a full search in the face of this mistake, we would not review that mistake under Leon's good faith standard."**

United States v. Ricciardelli, 998 F.2d 8, 17, n10 (1st Cir. 1983) citing United States v. Leon, 468 US 897 (1984). Agent Goehring knew that the triggering

event needed to animate the anticipatory warrant had not occurred, executed and participated in the search, therefore his actions cannot be saved by Leon's good faith standard.

Throughout the entire proceeding, Agent Goehring has knowingly, intentionally or with a reckless disregard for the truth, displayed the following, willful pattern of deceit upon the Court: 1.) Failed to alert the warrant—issuing magistrate of the "switch;" 2.) Instead of returning to the Court, he left probable cause determination up to himself and two AUSA's; 3.) Under oath he testified that he had become concerned of Calligan's history and the decided to make the "switch" when he had already detailed Calligan's criminal history in his warrant application; 4.) Falsely fashioned the return warrant to show that the 5F—ADB was retrieved from the residence when it was not; 5.) Under oath testified that he had not requested an anticipatory warrant but later states that he would have only allowed the searched to be executed "***If the package went inside***" and; 6.) Participated in the execution and search after a warrant made void by his very own actions. (MTS pg. 34 at 6-70.

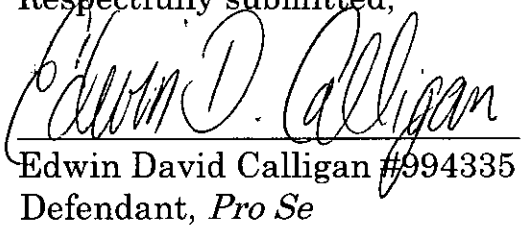
These Constitutional violations are not simple mistakes made by a rookie agent but calculated actions taken by an agent with "over nine years of experience" that has served and executed over "100 anticipatory warrants."

(App. E pg. 36, MTS pg. 4 at 21; MTS pg. 30 at 2). To deny suppression rewarding this type of conduct under the "good faith" exception would threaten the very fabric of the Fourth Amendment. Agent Goehring did not act in good faith, he only acted to save face.

CONCLUSION

This Court should grant the petition because 1.) The United States Court of Appeals for the Seventh Circuit issued an opinion that is contrary to and directly overrules this Court's precedent decision in United States v. Grubbs, 547 U.S. 90 (2006), as well as to establish clear guidance to law enforcement and other Courts as to 2.)Whether the Fourth Amendment requires law enforcement to return to the warrant—issuing magistrate judge if they alter the triggering event/conditions precedent to an anticipatory search warrant any time after the warrant application has been approved but before the actual servicing of the search warrant.

Respectfully submitted,



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