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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

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI

Edwin David Calligan #994335
Defendant, *Pro Se*
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In the
United States Court of Appeals
For the Seventh Circuit

No. 20-1817

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWIN CALLIGAN,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, Fort Wayne Division.
No. 1:17-CR-51-001 — Holly A. Brady, Judge.

ARGUED AUGUST 3, 2021 — DECIDED AUGUST 6, 2021

Before SYKES, *Chief Judge*, and BRENNAN and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Before his trial on gun and drug charges, Edwin Calligan moved to suppress evidence from the search of a house he frequented. He argued that the underlying warrant was anticipatory and should not have been executed because its triggering condition—the controlled delivery of a package with drugs, addressed to him, that police had intercepted—never occurred. Yet the district court

concluded that the warrant was supported by probable cause and had no triggering condition. The court therefore admitted the evidence, and a jury convicted Calligan. Because the district court judge was correct and, in any event, police relied on the warrant in good faith, we affirm.

I.

The mother of Calligan's girlfriend owned the house at issue and it was located in Fort Wayne, Indiana. Jonathan Goehring, a Special Agent from the Department of Homeland Security, obtained the warrant. His supporting affidavit reported that, about ten days earlier, customs agents had intercepted a package containing one kilogram of 5F-ADB (a synthetic cannabinoid and controlled substance, *see* 21 C.F.R. § 1308.11(d)(73)), addressed to that house, with Calligan as the addressee. Calligan had received more than 50 international shipments there—including 4 in the past several weeks—and local police had recently seen Calligan's car parked in the driveway. Calligan also had a criminal history: Agent Goehring reported Indiana convictions for attempted murder, criminal recklessness, and unlawfully resisting police, as well as a pending gun-possession charge. As for the foreign shipper of Calligan's package, customs agents had recently found fentanyl analogues in another package the shipper had mailed to a different addressee.

The agent further explained that, in his experience, traffickers often store drugs, packaging materials, cash proceeds, documentation, and guns at homes they do not own. He sought to search the house for those items here.

Finally, Agent Goehring asserted that there was "currently sufficient probable cause for this issuance of this search

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warrant." But then he noted his "intention ... to make a controlled delivery of the [package] containing the 5F-ADB" to the house, saying he would ("will") execute the warrant after the delivery.

The magistrate judge issued a warrant that said the "affidavit(s), or any recorded testimony, establish probable cause." The magistrate judge's only express condition was that the search take place during daylight on or before June 30, 2017; the expected delivery of the package went unmentioned.

Although police *did* deliver the package, it no longer contained drugs. Rather, agents had replaced the controlled substance with flour and brown sugar. After Calligan accepted the package, the officers executed the warrant and found money, a gun, and a notebook that contained both the package's tracking number and a recipe for making raw 5F-ADB into a consumable product. In the warrant return that followed, however, Agent Goehring inaccurately reported that police had also recovered a kilogram of 5F-ADB—i.e., the package's original contents.

The seized evidence led to charges against Calligan for possessing a firearm as a felon, *see* 18 U.S.C. § 922(g)(1), importing a controlled substance, *see* 21 U.S.C. § 952, and attempting to distribute a controlled substance, *see id.* § 846. And those charges led to two suppression motions at issue here.

In the first motion, Calligan argued that because the warrant application said police would deliver actual drugs to him, the agent's replacement of the drugs with flour and sugar took the search outside the warrant's scope. In doctrinal

terms, Calligan was characterizing this as an "anticipatory warrant" where the "triggering condition" for probable cause had not been satisfied. *United States v. Grubbs*, 547 U.S. 90, 94 (2006) (quoting Wayne R. LaFave, 2 Search and Seizure § 3.7(c) (4th ed. 2004)). The district judge referred this suppression motion to a magistrate judge—the same one who had issued the warrant—for an evidentiary hearing.

At that hearing, Agent Goehring testified that he was familiar with anticipatory warrants but had not sought one here. Rather, he had believed there was probable cause without any controlled delivery and had mentioned the delivery only because he predicted making it as part of executing the warrant. And, he continued, he replaced the drugs because otherwise he would have had to include a tracking device—a step that he concluded might endanger officers if Calligan found the device before the search began, given his violent history. Agent Goehring, however, thought through that problem only after obtaining the warrant. As for the incorrect information in the return, he testified that it was a mistake; he had not intended to deceive anyone.

The magistrate judge recommended denying Calligan's motion. He determined that Agent Goehring had not meant to condition the warrant on a delivery of actual drugs and did not include that condition in his affidavit; nor had the magistrate judge separately imposed such a condition on the warrant. In any event, there was probable cause without the controlled delivery. Over Calligan's objections, the district judge adopted these findings and recommendations and denied the motion, as well as Calligan's later motion to reconsider.

Then, in a second motion to suppress, Calligan cited *Franks v. Delaware*, 438 U.S. 154 (1978), and contended that

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Agent Goehring's warrant application relied on materially false representations (i.e., that police would deliver drugs to the home before the search). This time a different district judge (to whom the case had been reassigned) referred the motion to a second magistrate judge. That magistrate judge, in turn, recommended denying the motion without a hearing because Agent Goehring's affidavit yielded probable cause and the replacement of the drugs was immaterial. The district judge agreed and denied this motion too.

Then, at trial, the government relied on the items seized from the home. The jury convicted Calligan on all counts, and he was sentenced to 210 months in prison.

II.

On appeal, Calligan renews his argument that the warrant was anticipatory and that replacing the drugs with flour and sugar meant the triggering condition went unsatisfied, so that probable cause for the search never existed. Alternatively, he contends that Agent Goehring's failure to tell the issuing magistrate judge about this replacement meant the warrant rested on materially false information.

But the warrant was not anticipatory, and delivery of the actual drugs to Calligan was not a triggering condition. Objectively, no language in the warrant or affidavit conditions probable cause upon that anticipated delivery. Subjectively, Agent Goehring testified—credibly, in the view of the magistrate judge who issued the warrant—that he was not seeking an anticipatory warrant. By contrast, the affidavit in *Grubbs* insisted that the search would “not occur unless and until” the triggering condition was met. *Grubbs*, 547 U.S. at 94. Similarly, in *United States v. Dennis*, the affidavit requested

permission to search “*if and only if*” the condition was satisfied. 115 F.3d 524, 528 (7th Cir. 1997); *see also United States v. Elst*, 579 F.3d 740, 743 (7th Cir. 2009) (warrant application said that “*if*” condition occurred, “then your affiant requests this warrant be active for a search of the premises”).

Additionally, the magistrate judge rightly concluded that there was probable cause without the delivery of actual drugs. *See LaFave, 2 Search and Seizure § 3.7(c)* (6th ed. 2020) (explaining that probable cause absent the purported triggering condition may support a finding that the warrant was not anticipatory). 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.” *United States v. Carswell*, 996 F.3d 785, 791 (7th Cir. 2021) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). We defer to the decision of the issuing judge so long as substantial evidence supported it. *Id.*

Here, when he issued the warrant, the magistrate judge reasonably found a fair probability that the house contained evidence of drug crimes. Agent Goehring’s affidavit established 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. *See United States v. Dessart*, 823 F.3d 395, 400–01 (7th Cir. 2016) (intercepted packages likely containing controlled substance provided cause for search of house to which they were addressed); *see also United States v. Delgado*, 981 F.3d 889, 898 (11th Cir. 2020) (same, for two packages of controlled substances addressed to resident). The affidavit further established that Calligan’s car had been parked at the house and he had recently received other international deliveries there.

Finally, Agent Goehring opined that, in his experience, drug traffickers often keep drugs, records, packaging supplies, cash, and guns where they live (even if they do not own the property)—and the magistrate judge who issued the warrant was entitled to rely on that experience. *See United States v. Orozco*, 576 F.3d 745, 749 (7th Cir. 2009).

That leaves Calligan’s contention that Agent Goehring knowingly made false, material statements to get the warrant—specifically, that agents would deliver actual drugs before searching the home. He also urges that Agent Goehring’s misstatement on the warrant return (that the drugs from the intercepted package were found in the resulting search) is evidence of his intent to deceive the magistrate judge.

This argument lacks merit. To be sure, a search warrant is invalid if police obtain it by deliberately or recklessly presenting false, material information. *See Franks*, 438 U.S. at 155–56; *United States v. Woodfork*, 999 F.3d 511, 516 (7th Cir. 2021). But to receive a hearing on this point, Calligan had to make an initial showing that Agent Goehring’s incorrect prediction was material to the warrant. *See United States v. Clark*, 935 F.3d 558, 563 (7th Cir. 2019). He has not. The supposed misrepresentation would not have altered the magistrate judge’s probable-cause determination; as we explained, there was probable cause for the search without the delivery of the actual drugs. And Agent Goehring erred in filling out the warrant return after the magistrate judge had made his initial probable-cause finding. As such, it does not affect the validity of the warrant. Nor is it convincing proof of anything nefarious on Agent Goehring’s part.

Finally, even if probable cause technically were lacking, Agent Goehring’s good faith would make the evidence

admissible. *See United States v. Leon*, 468 U.S. 897, 922 (1984). The mere fact that an officer sought a warrant generates a presumption of good faith. *See United States v. Mykytiuk*, 402 F.3d 773, 777 (7th Cir. 2005). Calligan argues that he can rebut that presumption because Agent Goehring was “dishonest or reckless in preparing the supporting affidavit.” *Id.* But the district judge credited the agent’s plausible explanation for replacing the drugs, and that he was, at worst, negligent in filling out the warrant return. *See Elst*, 579 F.3d at 747. Calligan has not shown that these rulings are erroneous.

AFFIRMED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA)
v.) CASE NO.: 1:17-CR-51-TLS
EDWIN CALLIGAN)

OPINION AND ORDER

The Defendant, Edwin Calligan, is facing charges that (1) in June 2017, he illegally possessed a firearm, having previously been convicted of a felony, (2) from April to June 2017, he intentionally and knowingly imported a controlled substance (5F-ADB) from Hong Kong SAR, China, to the United States, and (3) in June 2017, he knowingly and intentionally attempted to commit an offense against the United States, namely the possession with intent to distribute a controlled substance. The Defendant has moved for the suppression of any physical evidence gathered pursuant to a search warrant from a particular address on Encino Drive, Fort Wayne, Indiana. The Defendant claims that the warrant, which was issued on June 16, 2017, was anticipatory and that, when the triggering condition—delivery of a target parcel containing contraband to the residence—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 inside the residence was the sham material that officials placed in the package to replace the drugs they removed.

This Court referred the matter to Magistrate Judge Paul R. Cherry to review the Motion and the Government's response, to conduct any and all necessary evidentiary hearings, to order additional briefing, and to issue a report and recommendation that included proposed findings of fact and recommendations for the disposition of the Defendant's Motion to Suppress. The

Magistrate Judge presided over an evidentiary hearing and received post-hearing briefs before issuing a Report and Recommendation [ECF No. 79].

In the June 28, 2018, Report and Recommendation, the Magistrate Judge concluded that the search warrant was not an anticipatory warrant, but that it contained facts providing probable cause to believe that the residence would presently contain evidence, fruits, and instrumentalities of drug offenses related to the importation of distribution amounts of the synthetic cannabinoid 5F-ADB. In sum, probable cause existed to support the search warrant without delivery of the target parcel containing the controlled substance. Accordingly, the Magistrate Judge recommended that the Court deny the Motion to Suppress.

On July 12, 2018, the Defendant filed his Objections to Findings, Report, and Recommendation. He objects to the conclusions that the search warrant was not intended to be an anticipatory warrant, and that the warrant was based on probable cause. He maintains that there was only minor evidence connecting the place to be searched with evidence of a crime absent the actual delivery of the contraband. He characterizes the search warrant affidavit as containing merely conclusory statements based on the agent's training and experience.

Also on July 12, 2018, the Government filed its Notice of No Objection to the Magistrate Judge's Findings, Report, and Recommendation [ECF No. 81]. The Government asks the Court to adopt Magistrate Judge Cherry's Findings, Report and Recommendation and deny the Defendant's Motion to Suppress. The Government asks the Court to rely on the prior filings in this case along with the transcript from the evidentiary hearing, standing by the arguments made in its Response [ECF No. 74]. Additionally, the Government asserts that, even if the search warrant was determined not to have been supported by probable cause, good faith

and the inevitable discovery doctrine would apply.

On July 23, 2018, the Defendant filed a Motion to Supplement Defendant's Objection to Findings, Report, and Recommendation [ECF No. 83], requesting to supplement his previous objections.¹ The Defendant highlights language in the affidavit stating that the warrant "will" be executed after the delivery of the Target Parcel, and argues that the agents did not "follow the directive that they set out and when they decided to serve the warrant without the triggering event occurring." (Mot. to Supplement 1.) The Defendant also compares his case to an anticipatory warrant case from the Eastern District of Tennessee, *United States v. Perkins*, 258 F. Supp. 3d 868, 879 (E.D. Tenn. 2017), where the court found that police officers violated the defendant's Fourth Amendment rights in executing the search of the defendant's residence when they failed to abide by the triggering event. Finally, the defendant requests that the objection be set for further evidentiary hearing.

The Court has reviewed the submissions, and finds that no evidentiary hearing is warranted. The Court adopts Magistrate Judge Cherry's Report and Recommendation.

ANALYSIS

A. Standard of Review

Under 28 U.S.C. § 636(b)(1)(A)–(B), a magistrate judge does not have authority to issue a final order on a motion to suppress evidence in a criminal case. Instead, the magistrate judge submits proposed findings of fact and recommendations to the district court. Parties have

¹ An identical submission was made on July 20, 2018 [ECF No. 82], but it was docketed as a supplement to the objection, rather than as a Motion to Supplement.

fourteen days to file “specific written objections” to a magistrate judge’s report and recommendation on a motion to suppress evidence. Fed. R. Crim. P. 59(b)(2). If a party files a timely objection to the magistrate judge’s report and recommendation, § 636(b)(1) provides that

the district judge is to make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The court may accept, reject, modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge also may receive further evidence or recommit the matter to the magistrate judge with instructions.

Portions of a recommendation to which no party objects are reviewed for clear error. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999).

The Court finds that the record before the Magistrate Judge is sufficient to allow this Court to make a de novo determination, where necessary. See *United States v. Raddatz*, 447 U.S. 667, 673–76 (1980) (holding that de novo review does not require a de novo evidentiary hearing). Although the Defendant has filed objections, and requested a hearing, he has not challenged the credibility of any of the witnesses, or identified any factual issues that would warrant a second evidentiary hearing. The Defendant’s objections focus on the Magistrate Judge’s conclusions regarding the legal implications of the undisputed facts. These undisputed facts include what information was presented in the search warrant affidavit, that the drugs in the target parcel scheduled for delivery to the Defendant at the Encino Drive residence were replaced with a legal substance, and that the warrant was executed after the delivery of the modified target parcel. The Court adopts and incorporates the facts as set forth in Report and Recommendation, and supplements the facts with evidence contained in the record where necessary to resolve the Defendant’s objections.

B. The Search Warrant

Before the Defendant would be entitled to suppress the evidence officers found at the Encino Drive residence upon execution of the search warrant, he would have to show that the warrant application did not contain facts that would lead a prudent person to believe that a search of the described premises would uncover contraband or evidence of a crime. *See United States v. Sidwell*, 440 F.3d 865, 868 (7th Cir. 2006) (describing probable cause requirement for issuance of a search warrant). A warrant can also be issued as an “anticipatory warrant” which “is ‘a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.’” *United States v. Elst*, 579 F.3d 740, 743 (7th Cir. 2009) (first quoting *United States v. Grubbs*, 547 U.S. 90, 94 (2006); then quoting 2 W. LaFave, *Search and Seizure* § 3.7(c), at 398 (4th ed. 2004)); *see also United States v. Dennis*, 115 F.3d 524, 528 (7th Cir. 1997) (noting that anticipatory warrants are issued “with the knowledge that contraband does not presently exist at the location to be searched” but with probable cause “to believe that contraband will be located at the premises to be searched after certain events transpire”). Here, the Defendant asserts that the warrant was anticipatory because there was no probable cause to enter the residence until a package containing contraband was delivered to the residence, and that this triggering condition never occurred because the contraband was removed from the package prior to its delivery. *See Dennis*, 115 F.3d at 528 (stating that “conditions precedent to the execution of an anticipatory warrant,” such as delivery of contraband, “are integral to its validity”). He contends that the language of the affidavit itself reveals it to be anticipatory:

While your Affiant believes there is currently sufficient probable cause for this 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.

(Hr'g Tr., Ex. A at 14 (emphasis added).)

As stated above, the Magistrate Judge concluded that the June 16, 2017, search warrant was not an anticipatory warrant, and did not depend on some future event taking place. Although the Defendant disagrees with this conclusion, his objection does not challenge the Magistrate Judge's recitation of the facts. One undisputed finding is that Agent Jonathan Goehring, when completing the affidavit in support of the warrant, stated several times that he believed probable cause presently existed for the search warrant. He included this statement immediately prior to describing the controlled delivery that the Defendant maintains rendered the warrant anticipatory. This is distinguishable from the affidavit in the *Perkins* case that the Defendant relies upon. In that case, after describing a controlled hand delivery of narcotics to the defendant, the officer completing the affidavit wrote: "*If the above conditions are met, your affiant and other agents/officers will execute this search warrant.*" *Perkins*, 258 F. Supp. 3d at 875 (emphasis added). Based on this condition, both parties agreed that the search warrant involved a triggering condition and was anticipatory. *Id.* at 872.

Despite Agent Goehring's statements regarding what he believed would presently be found inside the Encino Drive residence, the Defendant insists that Agent Goehring's testimony at the suppression hearing reveals that he "was not going to have the search warrant served unless the package went inside the residence because he was aware that the package being delivered prior to the service of the warrant had to occur to satisfy the directives as sworn in the

Application for the Search Warrant. The only event that supported probable cause to believe that evidence of controlled substances would be in the residence is the delivery of the TARGET PACKAGE containing the 5F-ADB.” (Def.’s Objections 2, ECF No. 80.)

The Defendant’s argument has several flaws. First, when Agent Goehring testified that officers were prepared to enter the house immediately after the delivery, assuming that the package went inside the house and not to a separate manufacturing facility or lab (Hr’g Tr. 37), he was speaking about the package that contained a sham substance made out of flour and brown sugar (*id.* at 32). His testimony was not in reference to a package containing 5F-ADB. Thus, it cannot reasonably be inferred from his testimony that he believed it was necessary for the package containing contraband to be delivered before the warrant could be served. Secondly, the whole of his testimony shows that he believed the search warrant was supported by probable cause even without delivery of the package. He specifically testified that if the package had gone to another location, officers would have followed it, but that he would have still executed the search warrant at the Encino Drive address looking for the other items he believed would be there pursuant to the search warrant. (Hr’g Tr. 38.)

As the Magistrate Judge noted, the agent’s statements within the affidavit reveal that he did not intend to seek an anticipatory warrant, and nothing about his testimony, or the explanation of the timing of the execution of the warrant, suggests otherwise. The Magistrate Judge also correctly noted that it is the Court, and not the government agent that determines whether probable cause exists to issue a warrant. On that point, the Report and Recommendation thoroughly addresses the contents of the affidavit to conclude that it contained sufficient facts to find that probable cause supported the search of the Encino Drive residence, independent of the

delivery of the actual drugs.

The Defendant complains that the search warrant affidavit contains merely conclusory statements based on the agent's training and experience. But that argument discounts the specific activity involving the Defendant and the Encino Drive residence that is set forth in the affidavit. True, the agent discusses his knowledge of the manufacture, traffic, use, and effects of smokable synthetic cannabinoid products, including those specific to 5F-ADB. He also sets out his knowledge of the practices of the importation and distribution of controlled substances, all of which was appropriate for the magistrate judge to consider when granting the warrant application. *See United States v. Orozco*, 576 F.3d 745, 749 (7th Cir. 2009) (noting the general rule "that a magistrate evaluating a warrant application is entitled to take an officer's experience into account in determining whether probable cause exists").

Agent Goehring also details the series of events that connected the importation of 5F-ADB to the Defendant and the Encino Drive address. On May 31, 2017, a parcel containing contraband from a suspected shipper of large quantities of synthetic drugs entered the United States. It contained the name of the shipper, the address of the shipper, the manifest of the parcel, and the declared value of the parcel. Identical information was used again in early June 2017 on a separate package addressed to the Defendant at the Encino Drive address. The June 2017 package was found to contain about one kilogram of 5F-ADB, which was capable of making 100 kilograms of finished product. The agent outlined additional information linking the Defendant to the Encino Drive address. He also advised that the Defendant had received about 58 international parcels from 2015 through June 2017, with most of them being delivered to the Encino Drive address. In the six weeks prior to submitting the affidavit, four international

shipments were addressed to the Defendant at the Encino Drive residence.

The “central teaching of [Supreme Court] decisions bearing on the probable cause standard is that it is a ‘practical, nontechnical conception.’” *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). The affidavit in this case contained information supporting a probable cause determination that the Defendant was involved in criminal activity (i.e., the receipt of distribution quantity of synthetic controlled substances through international shipments), and that a portion of this activity took place inside the Encino Drive residence. Moreover, the activity was recent and ongoing, with the Defendant receiving international packages dating back to 2015. The activity was also large scale. The parcel scheduled for delivery in June contained a sufficient amount of 5F-ADB to manufacture 100 kilograms of synthetic drug. Thus, it was reasonable to believe that evidence of this criminal activity would be presently located at the residence—even if the most recent shipment of 5F-ADB was not yet there. These would include many items other than the controlled substance itself. For example, as stated in Attachment B to the warrant, paper or electronic records related to the distribution of controlled substances, contact identification data related to distribution of controlled substances, money or financial records indicative of drug distribution, items of personal property tending to identify residency, firearms, communication devices, packaging or manufacturing paraphernalia, and shipping documentation indicating the shipment of parcels to and from Indiana or Hong Kong. “[A]n affidavit need only contain facts that, given the nature of the evidence sought and the crime alleged, allow for a reasonable inference that there is a fair probability that evidence will be found in a particular place.” *United States v. Aljabari*, 626 F.3d 940, 944 (7th Cir. 2010). The affidavit here satisfied that requirement.

For these reasons, the Court accepts the Magistrate Judge's conclusion that the search of the Encino Drive residence was undertaken pursuant to a valid search warrant and did not violate the Defendant's Fourth Amendment rights. Accordingly, the Motion to Suppress is denied.

CONCLUSION

The Court, having considered all of the Defendant's arguments, GRANTS the Motion to Supplement [ECF No. 83]. For the reasons stated above, the Court ADOPTS the Report and Recommendation [ECF No. 79], and DENIES the Motion to Suppress [ECF No. 53]. A separate scheduling order will be issued.

SO ORDERED on July 30, 2018.

s/ Theresa L. Springmann
CHIEF JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
v.) CAUSE NO.: 1:17-CR-51-TLS-PRC
EDWIN CALLIGAN,)
Defendant.)

**FINDINGS, REPORT, AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE PURSUANT TO
28 U.S.C. § 636(b)(1)(B) & (C)**

This matter is before the Court on Defendant's Motion to Suppress Physical Evidence and Incorporated Memorandum in Support Thereof [DE 53], filed by Defendant Edwin Calligan on January 23, 2018. Calligan requests that any physical evidence gathered from XXXX Encino Drive, Fort Wayne, Indiana, pursuant to the June 16, 2017 search warrant be suppressed because, he alleges, the search warrant was an anticipatory warrant and there was no probable cause to enter the residence when the triggering condition—delivery of the Target Parcel containing controlled substance 5F-ADB—did not occur.

On February 26, 2018, District Court Chief Judge Theresa L. Springmann entered an Order [DE 65] referring this matter to the undersigned Magistrate Judge for a report and recommendation on the instant motion pursuant to 28 U.S.C. § 636(b)(1)(B). This Report constitutes the undersigned Magistrate Judge's combined proposed findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). Finding that the search warrant was not an anticipatory warrant and that probable cause existed to support the search warrant without delivery of the Target Parcel, the Court recommends that the District Court deny the Motion to Suppress.

PROCEDURAL BACKGROUND

Defendant Edwin Calligan is charged by way of a three count Superseding Indictment (ECF 35) charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), importing a controlled substance into the United States, in violation of 21 U.S.C. § 952, and attempted possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 846. The Indictment also includes a forfeiture allegation. Evidence supporting the Superseding Indictment was recovered from the residence at XXXX Encino Drive, Fort Wayne, Indiana, during the execution of a search warrant on June 20, 2017, which was authorized by the undersigned United States Magistrate Judge on June 16, 2017, in cause number 1:17-MJ-36.

On January 23, 2018, Defendant Edwin Calligan filed the instant Motion to Suppress, requesting that any physical evidence seized from XXXX Encino Drive, Fort Wayne, Indiana, be suppressed because the evidence was seized in violation of his Fourth Amendment rights. The Government filed a response on January 31, 2018, and Calligan filed a reply on February 5, 2018. The Court ordered a supplemental brief, which Calligan filed on February 12, 2018. On March 19, 2018, the Court held an evidentiary hearing on the motion, receiving testimony and other evidence, including Exhibits A and B. On May 29, 2018, Calligan filed a post-hearing brief, to which the Government filed a response on June 12, 2018. Calligan filed a reply brief on June 19, 2018.

FACTUAL BACKGROUND

I. The Search Warrant Application and Supporting Affidavit

On June 16, 2017, United States Immigration and Customs Enforcement Homeland Security Investigations Special Agent Jonathan Goehring presented a search warrant application for XXXX Encino Drive, Fort Wayne, Indiana, to the undersigned magistrate judge. (Def. Ex. A). The search

warrant application indicates that it is related to a violation of 21 U.S.C. §§ 841(a)(1), 844, and 856 for the offenses of “possession with intent to distribute a controlled substance; possession of controlled substances; and maintaining a drug involved premises.” (Def. Ex. A). The application further indicates that the “basis for the search under Fed. R. Crim. P. 41(c)” is “evidence of a crime,” “contraband, fruits of crime, or other items illegally possessed,” and “property designed for use, intended for use, or used in committing a crime.” *Id.*

Attachment B to the application lists the items the agent had reason to believe were presently concealed at the XXXX Encino Drive address, including 5F-ADB or other controlled substances; various itemized materials relating to the distribution of controlled substances; cash, currency, and records indicative of the distribution of controlled substances; items of personal property related to residency, occupancy, control, or ownership of the premises; firearms and other dangerous weapons, firearms magazines, and ammunition; communications devices; paraphernalia related to the distribution of controlled substances; contact/identification data relating to the distribution of controlled substances; and shipping documentation. *Id.*

In the affidavit attached to the search warrant application, the agent states that “there is probable cause to believe that evidence of violations of 21 U.S.C. §§ 841, 844, and 856 is located at XXXX Encino Drive, Fort Wayne, Indiana . . .” (Ex. A, p. 3). Later, the agent again states, “I have set forth only the facts that I believe are necessary to establish probable cause to believe that evidence, fruits, and instrumentalities of violations of 21 U.S.C. §§ 841(a)(1), 844, and 856 are presently located at the Subject Premises.” *Id.* at p. 4.

The affidavit provides the following information. On June 5, 2017, the agent was contacted by the United States Customs and Border Protection, Tactical Analytical Unit, which had identified

a shipper from another country believed to be shipping large quantities of synthetic drugs to the United States. The agent was made aware of a specific parcel containing contraband from the suspected shipper that had entered the United States on May 31, 2017, and was informed of the name of the shipper, the address of the shipper, the manifest of the parcel, the declared value of the parcel, and the actual contents of the parcel identified as contraband during a border search of the parcel. *Id.* at p. 5. This parcel was not addressed to Defendant Calligan.

U.S. Customs and Border Protection had also identified a parcel from the same suspected shipper being shipped to “Edwin Calligan” at the XXXX Encino Drive, Fort Wayne, Indiana address with indicia identical to that of the May 31, 2017 parcel from the suspected shipper—the same name and address of the shipper, the same manifest, and the same declared value. The parcel addressed to Edward Calligan is identified throughout the affidavit as the “Target Parcel.” A border search was conducted of the Target Parcel. *Id.* at 5-6. The affidavit describes the contents of the parcel, including how the contents were packaged, and states that the parcel contained approximately 1 kilogram of 5F-ADB, a Schedule I Controlled Substance. The agent states that 1 kilogram of 5F-ADB is capable of making 100 kilograms of finished product, which is indicative of a distribution amount and not personal use. *Id.* at 6.

The agent discusses over many paragraphs his knowledge of the manufacture, traffic, use, and effects of smokable synthetic cannabinoid products, including that 5F-ADB is one of the most potent synthetic cannabinoids. *Id.* at 6-8. Elsewhere, the agent sets out in detail his related training and experience as well as his knowledge of the practices of the importation and distribution of controlled substances. *Id.* at 1-3, 10-13.

The agent goes on to describe the cargo bill for the Target Parcel, which identifies the consignee of the Target Parcel as Edwin Calligan at the Encino Drive address; his preliminary investigation into Calligan, linking Calligan to the Encino Drive address, including that Calligan's girlfriend's mother owned the residence; and Calligan's criminal history of a conviction for attempted murder, criminal recklessness, and resisting law enforcement in 1999, a conviction for resisting law enforcement in 1997, and an arrest that was still pending for gun possession by a serious violent felon in 2016. *Id.* at 8-9.

The agent then states that Calligan received approximately 58 international parcels from 2015 to the present (June 2017), with most of the shipments delivered to the Encino Drive address and at least one delivered to a different address in Fort Wayne where Calligan's mother resides and which is listed as Calligan's residence in the charge against Calligan for serious violent felon in possession of a firearm. *Id.* at 10. Also, in the six weeks prior to the affidavit, there were four shipments from international shippers to Calligan at the Encino Drive residence.

The agent then explains 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 states that, while he "believes there is currently sufficient probable cause for this 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." *Id.* at 14.

2. *The Decision to Replace the 5F-ADB in the Target Parcel with Sham Material and the Delivery of the Target Parcel*

At some point, the agent 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 violent history. (Tr. pp. 11:21-25; 30:21-23). The agent explained that, if the Target Parcel was part of a controlled delivery, certain necessary methods would have been used on the package to avoid the risk of losing the drugs, and the agent was concerned that, if Calligan noticed the evidence of those methods once the package was in his control, Calligan might have become violent with the officers serving the warrant after the delivery. (Tr. pp. 11:21-12:12; 31:4-32:5). Thus, the agent made the decision to replace the 5F-ADB in the Target Parcel with all sham material and spoke with the United States Attorney's Office to confirm it "would be okay." (Tr. pp. 12:14-16; 25: 11-15; 26:14-18). After the conversation, the decision was made to use sham material. (Tr. pp. 12:17; 30:15-23). The agent did not make a new application for a search warrant.

The agent testified that he prepared the sham material, which was then placed in the Target Parcel, which was repackaged for delivery. (Tr. p. 33:1-18). The Target Parcel did not contain 5F-ADB when it was delivered to XXXX Encino Drive, Fort Wayne, Indiana. (Tr. p. 11:18-19). However, the agent testified that it was his original intention to deliver the Target Parcel with the drugs inside. (Tr. p. 30:21). He also testified that, if the package did not go inside the residence but went somewhere else, they would have followed the package and then returned later to execute the search warrant at XXXX Encino Drive. (Tr. pp. 37:12-38:10).

The search warrant return, filed with the Court, contains a separate piece of paper titled "Inventory of the Property Taken and Name of Any Person Seized." (Ex. B). The seventh item on the inventory list is "1 international parcel containing 1 kg of 5F-ADB." *Id.* The agent testified that

he made a mistake in preparing the return because the package did not contain 5F-ADB but that his intention was not to deceive. (Tr. pp. 13:14-14:3). When asked by the Court how the mistake happened, the agent took responsibility and apologized, indicated that he had prepared the return, and stated that he copied the inventory off of what the evidence person had prepared and that he did not believe that he had miscopied it. (Tr. p. 14:16-21).

ANALYSIS

1. *Standing*

In its pre-hearing response brief, the Government contested Calligan's standing to challenge the search warrant on the basis that Calligan had not offered any evidence that he has standing to object to the search of the XXXX Encino Drive property. However, following the hearing, the Government now concedes that Calligan has satisfied the requirements of standing.

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Cons. amend. IV. In order to bring a motion to suppress for a Fourth Amendment violation, a defendant must demonstrate that he ““has a legitimate expectation of privacy in the invaded place.”” *Minnesota v. Olson*, 495 U.S. 91, 95 (1990) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz v. United States*, 389 U.S. 347 (1967))). And, “[a] subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.” *Id.* at 95-96 (internal quotation marks omitted) (quoting *Rakas*, 439 U.S. at 143-144, n. 12 (quoting *Katz*, 389 U.S. at 361)). In *Minnesota v. Olson*, the United States Supreme Court held that an overnight guest has a legitimate expectation of privacy in the host’s home, recognizing that this is the “everyday expectations of privacy that we all share.” *Id.* at 95-100.

At the hearing, Norma Simpson testified that she resides at XXXX Encino Drive, Fort Wayne, Indiana. (Tr. p. 42:11-12). She further testified that, on the day that her house was searched, Calligan was sleeping there. (Tr. pp. 42:15-43:1). Ms. Simpson also testified that Calligan slept at the Encino Drive residence three to four nights a week in June 2017. (Tr. p. 44:14-18). The United States Postal Inspection Service agent who made the controlled delivery of the Target Parcel to the Encino Drive residence testified that, when he handed the package to Calligan, it appeared that Calligan had just woken up. (Tr. p. 40:8-15). No evidence was presented at the hearing to dispute that Calligan was an overnight guest at the time the search warrant was executed. Therefore, because Calligan had an expectation of privacy in the Encino Drive residence, Calligan has standing to assert a violation of his Fourth Amendment rights in relation to the search warrant.

2. *Probable Cause*

Turning to the merits of the motion, Calligan argues that all evidence seized by law enforcement on June 20, 2017, pursuant to the June 16, 2017 search warrant, was seized in violation of the Fourth Amendment because there was no probable cause for the search. Calligan asserts that the search warrant is an anticipatory warrant because there was no probable cause to enter the residence until the delivery of the Target Parcel containing 5F-ADB, the “triggering condition,” and because service of the warrant was conditioned on the delivery of the Target Parcel containing the contraband. Calligan further reasons that, because the 5F-ADB was removed from the Target Parcel and replaced entirely with sham material before the controlled delivery of the Target Parcel, the contraband never entered the premises, the triggering condition never occurred, and, thus, there was never probable cause to support the search warrant.

However, the Court finds that the warrant was not conditioned on the delivery of the Target Parcel and the affidavit contained sufficient facts to find that probable cause existed without the delivery of 5F-ADB in the Target Parcel. As a result, the search warrant was not an anticipatory search warrant, the fact that no 5F-ADB was delivered with the Target Parcel does not change the finding of probable cause or void the warrant, and there was no Fourth Amendment violation.

“Anticipatory search warrants differ from other search warrants in that they are not supported by probable cause to believe that contraband exists at the premises to be searched at the time they are issued.” *United States v. Dennis*, 115 F.3d 524, 528 (7th Cir. 1997); *see United States v. Grubbs*, 547 U.S. 90, 94 (2006) (“An anticipatory warrant is ‘a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.’”). The Seventh Circuit Court of Appeals further explained, “In fact, a court issues an anticipatory warrant with the knowledge that contraband does *not* presently exist at the location to be searched.” *Dennis*, 115 F.3d at 528 (emphasis added) (citing *United States v. Leidner*, 99 F.3d 1423, 1425 (7th Cir. 1996)). Instead, the court must find that “probable cause exists to believe that contraband *will be* located at the premises to be searched *after* certain events transpire.” *Id.* (emphasis added).

“Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called ‘triggering condition.’” *Grubbs*, 547 U.S. at 94. Often, the condition precedent is the delivery of contraband. *Dennis*, 115 F.3d at 528 (citing *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989)). Notably, “[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.” *Id.* at 529 (quoting *United States v. Moetamedi*, 46 F.3d 225, 228-29 (2d Cir. 1995) (citing *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993))); *see also Grubbs*, 547 U.S. at 98-99 (holding that the Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself). And, the warrant affidavit containing the conditions need not be attached to the search warrant. *Id.* (citing *Moetamedi*, 46 F.3d at 228-29).

In this case, the agent specifically identified facts in the affidavit offered in support of probable cause to believe that there was then-currently evidence, fruits, and instrumentalities of violations of 21 U.S.C. §§ 841(a)(1), 844, 856 at the Encino Drive residence, reiterating several times that he believed probable cause presently existed for the search warrant. Although it is the Court, and not the agent or the Government, that determines whether there is probable cause to issue the warrant, these statements by the agent along with the detailed offer of evidence indicate that it was not the agent’s intention to seek an anticipatory search warrant.

However, Calligan asserts that the following language in the affidavit constitutes a “triggering condition,” rendering the search warrant an anticipatory warrant:

While your Affiant believes there is currently sufficient probable cause for this 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.

(Ex. A, p. 14). This is not a triggering condition because the delivery of the Target Parcel is not a condition precedent to the service of the warrant. The plain language of the affidavit shows that the agent intended for the events to unfold in this order. But, nowhere in the affidavit does the agent say

that the warrant will only be executed upon delivery of the Target Parcel. Nor did the Court separately condition the execution of the warrant on the delivery of the Target Parcel containing 5F-ADB. Thus, there is no condition on the face of the search warrant or in the body of the affidavit that the warrant not be served unless the Target Parcel was delivered.

Moreover, the search warrant is not an anticipatory warrant because the affidavit contains sufficient facts to find that probable cause supported the search without the delivery of 5F-ADB in the Target Parcel. When the affidavit is the only evidence presented to the magistrate judge issuing the warrant, “‘the warrant must stand or fall solely on the contents of the affidavit.’” *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002) (quoting *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967)); *see also United States v. Johnson*, 867 F.3d 737, 741 (7th Cir. 2017) (citing *United States v. Carson*, 582 F.3d 827, 831-32 (7th Cir. 2009)).¹ “Probable cause exists when ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” *Grubbs*, 547 U.S. at 95 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). “A search warrant affidavit establishes probable cause when it sets forth facts sufficient to induce a reasonable prudent person to believe that a search thereof will uncover evidence of a crime.” *United States v. Gregory*, 795 F.3d 735, 741 (7th Cir. 2015) (quoting *United States v. Roth*, 201 F.2d 888, 892 (7th Cir. 2000) (omitting citation and internal quotation marks)).

In other words, “[p]robable cause exists when it is reasonably believed that the evidence sought will aid in a particular apprehension or conviction for a particular offense and that the evidence is located in the place to be searched. Probable cause denotes more than mere suspicion,

¹ In its post-hearing response brief, the Government points to the agent’s statement in the affidavit that “[t]his affidavit is not intended to and does not set forth each and every fact and matter known by me or the government.” (Ex. A., p. 3). Because the Court looks to the four corners of the affidavit to determine probable cause, this statement adds nothing to the Court’s analysis.

but does not require certainty.” *United States v. Anton*, 633 F.2d 1252, 1254 (7th Cir. 1980). Rather, “probable cause is far short of certainty—it requires only a probability or substantial chance of criminal activity, not an actual showing of such activity, and not a probability that exceeds 50 percent (more likely than not), either.” *United States v Reichling*, 781 F.3d 883, 887 (7th Cir. 2015) (quoting *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012)). The United States Supreme Court has adopted a “totality of the circumstances” standard for the sufficiency of the allegations supporting probable cause. See *United States v. Hancock*, 844 F.3d 702, 708 (7th Cir. 2016) (quoting *United States v. Mullins*, 803 F.3d 858, 861 (7th Cir. 2015)); *Jones*, 208 F.3d at 608 (quoting *Gates*, 462 U.S. at 238-39). The task of the magistrate judge issuing the warrant “is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238.

The Court finds that the affidavit submitted with the search warrant application presents sufficient information to reasonably conclude that evidence of possession, of possession with the intent to distribute controlled substances, or of maintaining a drug involved premises was then-presently located and would be found at the Encino Drive residence without the delivery of the Target Parcel containing 5F-ADB. The affidavit provides that approximately 58 international packages had been sent to Calligan from 2015 to June 2017 at the Encino Drive address with four international packages delivered in the six weeks immediately preceding the search warrant application. Although the affidavit does not identify the shipper or contents of those 58 packages or that any of the 58 packages were from a suspected shipper of controlled substances, the affidavit states that the Target Parcel addressed to Calligan at the Encino Drive address containing 1 kilogram

of 5F-ADB was from the same suspected international shipper who had shipped a package containing a different contraband substance to another address in the United States in the same time frame. Both parcels had identical sender information (name and address) as well as an identical manifest and declared value of the parcel.

The affidavit links Calligan to the Encino Drive address in that his girlfriend's mother owned the property, his girlfriend told the police in December 2016 that she lived on Encino Drive, photos posted on social media showed Calligan with his girlfriend and a child, and a car known to be driven by Calligan was parked in the driveway on Encino Drive in June 2017. The Target Parcel addressed to Calligan at the Encino Drive address contained a kilogram of 5F-ADB, which the agent states in the affidavit is capable of making 100 kilograms of finished product, indicative of a distribution amount and not personal use.

The Court finds that, based on the totality of the facts presented in the affidavit, there was a fair probability that the items listed in Attachment B to the search warrant application related to the listed crimes were then-currently present at XXXX Encino Drive, Fort Wayne, and would be found there. It was not necessary for the Target Parcel containing the 5F-ADB to be delivered to the residence to satisfy the requirements of probable cause. In his brief, Calligan questions why the controlled delivery of the Target Parcel containing the 5F-ADB was planned if there was sufficient probable cause without the delivery. (ECF 70, p. 7). At the hearing, the agent explained that letting the controlled delivery of the parcel play out allows the agent to see whether the parcel is, in fact, going into the residence because sometimes the parcel is picked up by someone else and goes somewhere else, in which case the agent would have followed the package and then returned later to execute the warrant at the Encino Drive residence. (Tr. pp. 22:3-11; 38: 3-9). The agent also

believes that serving a warrant once the defendant has what he believes to be a package full of drugs in his possession inside the residence is a strong incentive for the defendant to cooperate or even to confess. (Tr. p. 22:12-15). Based on the finding of probable cause, the Court recommends that the District Court deny the Motion to Suppress.²

As a final matter, the Court recognizes that, throughout his post-hearing briefing, Calligan asserts that the agent had a reckless disregard for the truth in relation to events that occurred after the search warrant was issued and executed. (ECF 70, pp. 1, 5, 8, 9, 12); (ECF 77, pp. 5, 6).³ However, as explained above, the determination of probable cause requires the Court to consider the information contained within the four corners of the affidavit submitted with the application. In this case, probable cause existed without the delivery of the Target Parcel, which means that the search warrant was not an anticipatory warrant, and the agent's subsequent actions do not void the search warrant. Nevertheless, the Court is concerned by three aspects of these events identified by Calligan in his briefs, worthy of noting here.

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

² Because there was probable cause to support the search warrant, the Court need not address the alternative arguments of good faith and inevitable discovery raised by the Government in its response brief.

³ Calligan has not moved to suppress on the basis that information was included in the affidavit with a reckless disregard for the truth at the time the warrant was sought. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). However, even if Calligan were attempting to prove and had offered facts to prove that information in the affidavit was included with a reckless disregard for the truth, the result would nevertheless stay the same because "sufficient allegations existed in the affidavit warranting the search irrespective of the affiant's alleged errors." *United States v. Hancock*, 844 F.3d 702, 708 (7th Cir. 2016) (quoting *United States v. Mullins*, 803 F.3d 858, 861-62 (7th Cir. 2015)). As set forth above, the affidavit contained sufficient information to support a finding of probable cause for the search without the delivery of the Target Parcel.

hundred controlled deliveries, included Calligan's criminal history in the affidavit; therefore, it is unclear why the concern did not arise at the time the search warrant affidavit and application were prepared. 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 to obtain a search warrant based on the changed facts. 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 substance.

CONCLUSION

Based on the foregoing, the Court **RECOMMENDS** that the District Court **DENY** Defendant's Motion to Suppress Physical Evidence and Incorporated Memorandum in Support Thereof [DE 53].

This Report and Recommendation is submitted pursuant to 28 U.S.C. § 636(b)(1)(C). Pursuant to 28 U.S.C. § 636(b)(1), the parties shall have fourteen (14) days after being served with a copy of this Recommendation to file written objections thereto with the Clerk of Court. The failure to file a timely objection will result in waiver of the right to challenge this Recommendation before either the District Court or the Court of Appeals. *Willis v. Caterpillar, Inc.*, 199 F.3d 902, 904 (7th Cir. 1999); *Hunger v. Leininger*, 15 F.3d 664, 668 (7th Cir. 1994); *The Provident Bank v. Manor*

Steel Corp., 882 F.2d 258, 260-261 (7th Cir. 1989); *Lebovitz v. Miller*, 856 F.2d 902, 905 n.2 (7th Cir. 1988).

So ORDERED this 28th day of June, 2018.

s/ Paul R. Cherry

MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 9, 2021

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 20-1817

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Appeal from the United States District
Court for the Northern District of
Indiana, Fort Wayne Division.

v.

No. 1:17-cr-00051-HAB-SLC-1

EDWIN CALLIGAN,
Defendant-Appellant.

Holly A. Brady,
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc, no judge in regular active service has requested a vote on the petition for rehearing en banc¹ and the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing and petition for rehearing en banc is DENIED.

¹ Circuit Judge Thomas L. Kirsch II did not participate in the consideration of this petition for rehearing en banc.

AFFIDAVIT

Comes now Special Agent Jonathan Goehring, of the United States Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI"), first being duly sworn now deposes and says:

I am investigative or law enforcement officer within the meaning of Section 2510(7) of Title 18, United States Code, that is an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

I have been employed by the United States Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI"), since June 2009. I am currently assigned as a Special Agent with the HSI Indianapolis, Indiana office. In connection with my official HSI duties, I investigate criminal violations of the federal narcotics laws, including, but not limited to, Title 21, United States Code, Sections 841, 843, 846, 848, 952 and 963. I also investigate violations of the federal money laundering and bulk cash smuggling laws, including, but not limited to, Title 18, United States Code, Sections 1956 and 1957, and Title 31, Section 5332. I have received special training in the enforcement of laws concerning controlled substances as found in Title 21 of the United States Code. I also have been involved in various types

of electronic surveillance, and in the debriefing of defendants, witnesses and informants, as well as others who have knowledge of the distribution and transportation of controlled substances, and of the laundering and concealing of proceeds from drug trafficking offenses.

I have received training in investigations involving individuals smuggling, transporting and distributing illegal narcotics. I am familiar with the ways in which drug traffickers conduct their business, including, but not limited to, their methods of importing and distributing controlled substances, their use of telephones and digital display paging devices, and their use of numerical codes and code words to conduct their transactions.

I have also received training in money laundering and bulk cash smuggling techniques utilized by drug trafficking organizations to launder, conceal, and transport illicit financial proceeds related to narcotics crimes throughout the United States and across international borders. I am familiar with the ways in which drug trafficking organizations transport their proceeds, including, but not limited to, their methods of collecting and transporting bulk currency, their use of passenger and commercial vehicles for concealment, their use of currency "mules" and handlers to avoid law enforcement detection, and

their use of sophisticated compartments and cross-border smuggling techniques.

I am familiar with and have participated in all of the normal methods of investigation, including, but not limited to, visual surveillance, the general questioning of witnesses, the use of informants, the use of pen registers, the utilization of telephone wiretaps, the execution of search warrants, and undercover operations.

I am currently investigating possible violations of 21 U.S.C. §§ 841(a)(1), 844, and 856. As will be shown below, there is probable cause to believe that evidence of violations of 21 U.S.C §§ 841, 844, and 856 is located at 4218 Encino Drive, Fort Wayne, Indiana 46816 (hereinafter referred to as the "**Subject Premises**") which is more fully described in Attachment A.

Your Affiant submits this application and affidavit in support of a search warrant authorizing the search of **Subject Premises** for the items listed in Attachment B. This affidavit contains information necessary to establish probable cause for the issuance of the search warrant being sought pursuant to this Application. This affidavit is not intended to and does not set forth each and every fact and matter known by me or the government.

Your Affiant seeks to seize evidence of federal criminal violations, more specifically these offenses include, but are not limited to: possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1), possession of a controlled substance in violation of 21 U.S.C. § 844, and maintaining a drug involved premises in violation of 21 U.S.C. § 856. I request authority to search the entire premises, including the residential dwelling and any computer and computer media located therein where the items specified in Attachment B may be found, and to seize all items listed in Attachment B as instrumentalities, fruits, and evidence of a crime.

The statements in this Affidavit are either known to your Affiant personally, or have been told to your Affiant directly by law enforcement officers and others with whom your Affiant has worked on this case. Since this Affidavit is being submitted for the limited purpose of securing a search warrant, your Affiant has not included each and every fact known to me concerning this investigation. I have set forth only the facts that I believe are necessary to establish probable cause to believe that evidence, fruits, and instrumentalities of violations of 21 U.S.C. §§ 841(a)(1), 844, and 856 are presently located at the **Subject Premises**.

On June 5, 2017, I was contacted by a member of the United States Customs and Border Protection (“CBP”), Tactical Analytical Unit (“TAU”), who had identified a shipper in Hong Kong believed to be shipping large quantities of synthetic drugs to the United States. Specifically, on May 31, 2017, HSI Pittsburgh agents seized a parcel from The Airport Group, Flat F, 8/F, Tower 2 Century Gateway, 87 TM Heung; Sze Wu Road Tuen Mun, Hong Kong inbound into the United States. The parcel was manifested as “Plastic Fittings” and had a declared value of “1500.” A border search of the parcel located two foil bags later determined to be 75 grams of Methoxyacetyl Fentanyl and 25 grams of Cyclopropyl Fentanyl, both fentanyl analogues.

TAU had identified a parcel from the same suspected supplier, The Airport Group, Flat F, 8/F, Tower 2 Century Gateway, 87 TM Heung; Sze Wu Road Tuen Mun, Hong Kong, being shipped to Edwin Calligan (hereinafter, CALLIGAN), 4218 Encino Drive, Fort Wayne, IN 46816, bearing United States Postal Service tracking number LK135352544HK (“TARGET PARCEL”). The TARGET PARCEL is also manifested as “Plastic Fittings” with a declared value of “1500.”

On June 12, 2017, U.S. Customs and Border Protection Officers with the Chicago Foreign Mail Unit conducted a border search of the inbound TARGET PARCEL at the Chicago, IL Mail Port of Entry

pursuant to their border search authority granted by Title 19, United States Code, Sections 482, 1467, 1496, 1581 and 1582 after the parcel arrived at the United States Port of Entry on board United Airlines Flight 896 from Hong Kong. Located inside the parcel was an orange and yellow plastic bag bearing a photograph of a dog with Chinese and English writing purporting to contain 1000 grams of dog food. Inside the dog food bag was a clear plastic zip lock type bag containing a tan powdery substance and weighing approximately 1 kilogram. Presumptive laboratory analysis conducted by the CBP Analytical laboratory has identified the substance as N-[[1-(5-fluoropentyl)-1H-indazol-3-yl]carbonyl]-3-methyl-D-valine methyl ester (5F-ADB), a Schedule I Controlled Substance. 1 kilogram of 5F-ADB is capable of making 100 kilograms of finished product, which is indicative of a distribution amount and not personal use.

I know that in recent years, individuals have begun to manufacture and traffic in smokable synthetic cannabinoid products, many times known on the street as "Spice" or "K2." Smokable synthetic cannabinoid products are a mixture of an organic "carrier" medium, such as the herb-like substance Damiana, which is then typically sprayed or mixed with a synthetic compound chemically similar to THC (tetrahydrocannabinol), the psychoactive ingredient in marijuana.

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These products, laced with synthetic cannabinoids are smoked for their psychoactive effects.

Currently, there are hundreds of synthetic cannabinoid compounds. As these compounds are discovered, they are oftentimes emergency scheduled by the Drug Enforcement Administration. In response, clandestine manufacturers and traffickers began distributing smokable synthetic cannabinoid products containing slightly varied synthetic cannabinoid compounds in an attempt to circumvent newly enacted federal and state laws. Smokable synthetic cannabinoid products are commonly purchased in head shops, tobacco shops, convenience stores, adult stores and over the Internet. They are often marketed as incense, potpourri or "fake weed" and almost always carry the markings "not for human consumption." These markings are routinely in place in an attempt to circumvent the product being identified as a controlled substance or controlled substance analogue of the newly controlled synthetic cannabinoids. Users of these products have reported effects similar to marijuana, but many times greater to include but not limited to paranoia, panic attacks, increased heart rate and increased blood pressure.

I know, from my training and experience, 5F-ADB has been identified as one of the most potent synthetic cannabinoids and elicits

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severe psychotic symptoms in humans, sometimes causing death. In response, on April 10, 2017, the Administrator of the Drug Enforcement Administration issued a temporary scheduling order to schedule 5F-ADB as a Schedule I Controlled Substances in order "to avoid an imminent hazard to the public safety."

The USPS cargo bill for TARGET PARCEL lists the following information:

Shipper name: THE AIRPORT BRANCH

Address: FLAT F, 8/F, TOWER 2 CENTURY GATEWAY
87 TM HEUNG; SZE WU ROAD TUEN MUN
HK
HONG KONG

Consignee: EDWIN CALLIGAN
4218 ENCINO DRIVE
FORT WAYNE, INDIANA 46816

Your Affiant began conducting a preliminary investigation into the consignee of the 5F-ADB shipment. Allen County, Indiana property tax records indicate 4218 Encino Drive, Fort Wayne, IN is owned by Norma Simpson, the mother of Tiffany Simpson. On November 13, 2016, the Fort Wayne Police Department responded to a battery complaint filed by a resident of 4219 Encino Drive, Fort Wayne who claimed he/she had been beaten up by her neighbor Tiffany Simpson and Tiffany's boyfriend,

Edwin CALLIGAN. As part of the battery investigation, Tiffany Simpson was interviewed on December 5, 2016 and confirmed her address to be 4218 Encino Drive, Fort Wayne. Tiffany Simpson also confirmed she knew Edwin CALLIGAN and had been with CALLIGAN the night of the alleged battery. Additionally, Tiffany Simpson's Facebook page has several professional photographs of Tiffany Simpson with CALLIGAN and a child.

On April 3, 2017, Fort Wayne Police Department Officer Shannon Hughes conducted a traffic stop of a blue 1977 Chevrolet bearing Indiana license plate number AP115G for speeding. The driver of the Chevrolet was Edwin David CALLIGAN who was issued a citation for speeding. On June 9, 2017, officers observed the same 1977 Chevrolet that had been driven by CALLIGAN parked in the driveway of 4218 Encino Drive, Fort Wayne, IN.

A National Crime Information Center database check indicates that CALLIGAN was convicted of Attempted Murder, Criminal Recklessness and Resisting Law Enforcement in 1999 in Indiana. In 1997, CALLIGAN was convicted of Resisting Law Enforcement in Indiana. In 2016, CALLIGAN was arrested for Gun Possession by a Serious Violent Felon, which is still pending in the Allen County, Indiana Superior Court.

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U.S. Customs and Border Protection database check revealed that Edwin David CALLIGAN has received approximately 58 international parcels from 2015 to the present. Most of those shipments have been delivered to 4218 Encino Drive, Fort Wayne, Indiana with at least one being delivered to 2630 Chandler Dr., Fort Wayne, Indiana. Your Affiant has learned that CALLIGAN'S mother resides at 2630 Chandler Dr. In addition, 2630 Chandler Dr., is listed as the CALLIGAN's address in the pending State charge against CALLIGAN for Serious Violent Felon in Possession of a Firearm, according to mycase.IN.gov. There have been four (4) shipments to CALLIGAN at the Encino Drive residence in the last six weeks from international shippers. There has been at least one seizure by the United States of a package shipped from FLAT F, 8/F, TOWER 2 CENTURY GATEWAY; 87 TM HEUNG; SZE WU ROAD TUEN MUN; HK;HONG KONG (the same shipping address listed on TARGET PARCEL) which contained a synthetic drug.

On June 13, 2017, HSI Special Agent Eric Radakovitz shipped the TARGET PARCEL along with a sealed evidence bag containing the 5F-ADB to the HSI Indianapolis office for an attempted controlled delivery.

Based upon my training, experience, and conversations with other law enforcement officers, I know that:

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- a. Drug traffickers often purchase, title, or lease assets such as homes in fictitious or alias names, or in the names of relatives or other associates in order to avoid detection and suspicion by law enforcement; however, even though the asset may not be in the name of the drug trafficker, he nevertheless actually owns, continues to use, or exercises control over these assets. It is common for a drug trafficker to reside at a location even though his name is not on the ownership paperwork. It is important therefore to search for and seize documents and paperwork tending to establish the person or persons who occupy, use, own, or control a residence or residences.
- b. Drug traffickers often keep cash on hand and to store it in a variety of locations, which could include a residence or multiple residences. Drug traffickers must often keep money on hand in order to maintain and finance their drug supplies and in order to continue to purchase more drugs, supplies, and equipment. Drug sales typically generate a large amount of cash in smaller denominations. Because they often have large amounts of drugs or cash on hand, it is common for other individuals to burglarize their homes or

other storage locations and to steal the drugs or cash. It is important as well to search for and seize financial documents in order to locate and track the destination of illegal drug proceeds and to investigate any claimed legitimate sources of income.

- c. It is common for drug traffickers to possess and carry firearms or other dangerous weapons in order to protect their profits, supply of drugs, and themselves from others who might attempt forcibly to take these items. Because it would expose their drug business, drug traffickers rarely notify or utilize law enforcement when burglaries or robberies of their drug business occur, choosing instead to protect themselves through weapons and secrecy. Therefore, it is common to find firearms, ammunition, magazines, and other weapons near drug stashes or cash. In addition, CALLIGAN is known to be in possession of firearms based on his criminal history cited above.
- d. Drug traffickers often keep and maintain books, records, receipts, notes, or other drug ledgers in order to keep track of amounts paid and owed to other individuals. These ledgers and notes oftentimes are invaluable for discerning

an individual's suppliers or customers, especially if compared to telephone records, telephone directories, address books, contact lists, and so forth.

- e. Drug traffickers often possess in stash locations paraphernalia for packaging, processing, weighing, and distributing drugs. Most drugs are sold by weight, and it is very common for drug traffickers to keep or maintain one or more weighing scales and associated calibration weights or instruction manuals with these scales, oftentimes containing drug residue.
- f. Drug traffickers often utilize computers, cellular telephones, Blackberry devices, cameras, camcorders and other electronic media storage devices to place orders, record, track, and keep records and photographs of narcotics shipments, customers, suppliers, and expenses. These electronic and computer devices often necessitate further examination at a later time at a secure law enforcement facility following the conclusion of enforcement activities.

This affidavit is made in support of an application for a federal search warrant to search:

a. The premises of 4218 Encino Drive, Fort Wayne, Indiana 46816. The subject residence is further described as follows: It is a two-story residence that has red and brown brick on the first story with light blue siding, black shutters and white trim on both the first and second stories and a gray shingle roof. The garage door has been replaced with white siding and two windows. There are four (4) large white columns along the front porch. See Attachment A

While your Affiant believes there is currently sufficient probable cause for this 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 4218 Encino Drive, Fort Wayne, Indiana 46816. The search warrant will be executed after the TARGET PARCEL has been delivered.

Based on the foregoing facts, your Affiant believes there is probable cause to believe there has been a violation of 21 U.S.C. §§ 841, 844 and 856, which prohibit the possession with intent to distribute a controlled substance, the possession of a controlled substance, and the maintaining of a drug involved premises, and that evidence of those

violations are concealed on the **Subject Premises**. Your Affiant therefore, believes there is probable cause for the issuance of this warrant and seeks permission to enter and search the premises commonly known as 4218 Encino Drive, Fort Wayne, Indiana 46816, for controlled substances, records relating to the distribution of controlled substances, United States currency, cutting substances, paraphernalia, firearms, U.S. Currency, as more fully detailed in Attachment B, as fruits and instrumentalities of violations of 21 U.S.C. §§ 841(a)(1), 844 and 846, your Affiant requests permission to execute the search warrant and search the target location for the items listed in Attachment B.

The foregoing facts are true to the best of your Affiant's knowledge and belief.

Further your Affiant sayeth naught.



Jonathan Goehring
Special Agent
Homeland Security Investigations

Subscribed and sworn to before me, this 16th day of June, 2017.

S/Paul R. Cherry

Paul R. Cherry
United States Magistrate Judge
Northern District of Indiana

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