No.

In the Supreme Court of the United States

Grant Manaku, Petitioner

v.

United States of America, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

When executing a search warrant, agents disassembled their five-page warrant, disregarded homeowners' repeated requests for a copy of the warrant, and served (when the search was done) only the warrant's face-sheet. Did the agents deliberately violate the federal rule of criminal procedure—Rule 41(f)(1)(C)—that requires agents to serve a warrant when that warrant is executed?

Parties and Proceedings

The caption lists all parties to the proceedings in this case.

The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the District of Hawaii and the United States Court of Appeals for the Ninth Circuit: *United States v. Manaku*, D.C. No. 1:18-cr-00069-LEK-1 (D. Haw.), and *United States v. Manaku*, No. 20-10069 (CA9).

Counsel is not aware of any other proceedings in any other court that are directly related to this case.

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Opinion Below

The Ninth Circuit's per curiam decision is published as *United States v. Manaku*, 36 F.4th 1186 (CA9 2022), a copy of which is Appendix A to this petition.

Jurisdiction

The Ninth Circuit entered judgment on June 14, 2022, and denied rehearing en banc on August 5, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

Pertinent Positive Law

1. The Fourth Amendment: "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." U.S. Const., amend. IV.

2. Rule 41: "The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, and from whose premises, the property was taken or leave a copy of the

warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(1)(C).

Proceedings Below

1. In the district court, the government prosecuted the petitioner on a charge of possessing child pornography. Agents obtained key evidence against him by executing a search warrant on his residence, a friend's family home. The petitioner moved to suppress the evidence agents obtained under the warrant because the agents deliberately violated Rule 41(f)(1)(C), a federal rule of criminal procedure that requires service of a warrant when the warrant is executed.

A suppression hearing established that an unidentified agent deliberately removed the staple holding the five-page warrant together, that multiple agents disregarded homeowners' repeated requests for a copy of the warrant, and that an agent served, once the six-hour search came to an end, only the warrant's face-sheet, rather than the entire five-page warrant, on one of the homeowners. In denying the suppression motion, the district court focused on the agent that provided the face-sheet, ruled he was negligent in serving one page instead of five, and denied the petitioner's Rule 41 suppression claim on the ground that the agent did not deliberately violate

Rule 41's service rule. The district court did not explain why the conduct of other agents, either alone or as a team, did not establish sufficient disregard of the rule to trigger suppression under the Ninth Circuit's well-established Rule 41 caselaw. *See*, *e.g.*, *United States v. Henderson*, 906 F.3d 1109, 1114–1115 (CA9 2018).

2. On direct appeal to the Ninth Circuit, the petitioner pursued his Rule 41 suppression claim. He contended that the district court erred in focusing on one agent's self-serving proclaimed negligence and in disregarding other agents' deliberate evasion, singly or collectively, of Rule 41's service requirement. The Ninth Circuit affirmed in a per curiam published opinion. *See* Appendix A. The Ninth Circuit acknowledged that the agents violated Rule 41. *See Manaku*, 36 F.4th at 1189–1190. But then held that they did not deliberately do so. *See id.* at 1190–1191. The Ninth Circuit inferred that the agents who refused to provide a copy midstream, upon the homeowners' requests, had simply deferred to the negligent housekeeping agent tasked with complying with Rule 41 at the end of the search, even though no agent testified to such a notion. *See id.* at 1190–1191. The Ninth Circuit's sanitized discussion of the other agents' conduct, moreover, did not reckon with what the record in this case establishes. *See id.* at 1190–1191.

3. The record created at the suppression hearing established the following. The government chose to use twenty-six agents to execute a warrant authorizing them to search the petitioner's residence for evidence of a non-violent and passive possessory offense (there was no allegation that the petitioner was involved in production or otherwise engaged in abusive or violent conduct). The agents staged the operation a few blocks away from the residence. Each agent reviewed the five-page, stapled search warrant. And each agent, including the agent who would later serve only one page of the warrant, signed it on the backside of the warrant's final, fifth page. The record—replete with agents referring to the warrant as "it" rather than in the plural—suggests that the agents only had this one copy of the warrant on hand during the operation.

The agents stealthily approached the house early in the morning and deployed disorienting flash-bang devices at each door of the home, quickly encountered and handcuffed occupants, and then spent some six hours searching the residence for evidence of the petitioner's possession of child pornography. The record does not evince why such overwhelming force was necessary to execute a warrant for evidence of a non-violent offense; but the tactics agents used here implies that this group of agents were more fervid than the occasion called for, as they sought to ferret out evidence of criminal activity. *Cf. Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (recognizing that "zealous officers[,] … engaged in the often competitive enterprise of ferreting out crime" cannot be trusted to follow rules that they think hamper their ability to ferret effectively).

At some point during the operation, the staple was removed from the warrant and the pages were detached from each other. The record establishes that only an agent could have been the one to do so, but the government has never revealed who that agent was. The failure to own the warrant's disassembly does not support the notion that there was an innocent, rather than overzealous, reason for disassembling the warrant.

During the search both homeowners (the mother and father of the petitioner's friend) repeatedly demanded, of no less than three different agents, to see the warrant. When the father, who was himself a local police officer, did so, one agent "took it out," handed it to another agent, who then merely flashed the single-page face-sheet at the father while pivoting the conversation to a different topic. That agent assured the father, who had to return to work, that the warrant would be left with the mother when the search was over. A broken promise does not support an inference of benign intent either.

A different agent tended to Rule 41 housekeeping—inventorying seized property and effecting service of both the warrant and the inventory—at the end of the search. The housekeeping agent was among those who had signed the five-page warrant when staging the operation. Once the search was complete, he located the paperwork that he was tasked with completing laid out on a table for him. The government has, likewise, never revealed which agent set the table for the housekeeping agent. Found amongst the other papers was the face-sheet (and only the face-sheet) of the warrant, folded up and dirty. The housekeeping agent gave the face-sheet to the mother after jotting an FBI "legal counsel" phone number on the back of it for her to call if she had any questions.

The housekeeping agent had no explanation for why the table-setting agent did not place all of the warrant's pages on the paperwork table. Nor could he explain how, after having reviewed and signed the five-page warrant and jotting a phone number on the back of the disassembled face-sheet, he overlooked the fact that he was not handing the entire warrant to the mother at the end of the search. The lack of such explanations is yet another indicium of deliberate disregard of Rule 41's service requirement. Be it because the housekeeping agent was duped by other, more zealous field agents deliberately evading service of the warrant or, less charitably, because the housekeeping agent duped the district and circuit courts with dissembling suppression hearing testimony, the lack of *any* reasonable explanation in the record here for all the choices agents made, resulting in the failure to serve the warrant, evinces more, not less, deliberation in the agents' violation of Rule 41's service requirement.

Reason to Grant the Writ of Certiorari

Under well-established Ninth Circuit law, deliberate disregard of Rule 41's service requirement triggers suppression of evidence that agents obtained under the deliberately unserved warrant. *See Henderson*, 906 F.3d at 1114–1115. The district and circuit courts concluded that the record here established a violation of Rule 41's service requirement, but thought the violation was not deliberate. This Court should grant this petition to affirm that the record here adequately evinces deliberate disregard of Rule 41's service requirement.

This Court has taken pains, over the years, to emphasize that the whole point of the exclusionary rule is to deter misconduct in the execution of a criminal investigation. *See*, *e.g.*, *Lange v. California*, 141 S.Ct. 2011, 2027 (2021) (Thomas, J., concurring) ("we have said time and again that the *sole* factor courts can consider is deterring misconduct by law enforcement, … to deter *intentional* conduct" (cleaned up but retaining original emphases)). When "the constable has blundered," when, that is, agents intentionally ignore the rules they have a duty to abide, the exclusionary rule steps in to deter future blunders of similar ilk, even if applying the exclusionary rule means "the criminal [will] go free[.]" *Davis v. United States*, 564 U.S. 229, 249 (2011) (quoting *People v. Defore*, 150 N.E. 585, 587 (1926) (Cardozo, J.)) (cleaned up). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct[.]" *Herring v. United States*, 555 U.S. 135, 144 (2009).

Law enforcement officers are unlikely to confess, in open court, that they deliberately violated a rule they had a duty to abide or, for that matter, admit to committing any other sort of intentional error during an investigation. Their authoritarian natures and the competitive enterprise, in which they perceive themselves on the side of the angels, of ferreting out crime do not readily lend themselves to such open admissions. *Cf. Riley v. California*, 573 U.S. 373, 382 (2014) (quoting *Johnson*, 333 U.S. at 14). Malign and invidious intent, for purposes of triggering the exclusionary rule, will typically, if not invariably, be a matter of drawing the most reasonable inference from what agents did during the investigation, measuring the self-serving things agents later say to justify their past deeds against what they in fact did and the common sense inferences that their deeds imply.

The record in this case demonstrates that experienced agents made a series of reinforcing deliberate choices—many, if not all of them, left unexplained—that resulted in a violation of Rule 41. The only reasonable inference to draw on such a record is that the agents overzealously cut a corner and deliberately violated Rule 41. The agents inexplicably chose to use overwhelming force to execute a five-page warrant, which each officer reviewed and signed, to search for evidence of a non-violent, possessory offense. The agents inexplicably chose to bring only one copy of the warrant to the search. The agents inexplicably chose to take the staple out of the top left corner of the warrant, disassembling it with enough care so as not to tear it and to minimize the absence of the staple and other pages of the warrant, thereby making the absence less noticeable. The agents inexplicably chose to disregard repeated requests to produce the warrant. The agents inexplicably chose to place only the warrant's face-sheet, rather than the entire warrant, on the paperwork table. And an agent, who knew the warrant consisted of five pages and who then wrote on the back of the detached face-sheet, inexplicably served only the face-sheet when the six-hour search was completed. In the face of so many deliberative choices that agents failed to reasonably explain, common sense allows for only one reasonable inference: the agents deliberately chose not to serve the warrant as Rule 41 requires.

The petitioner is aware that this Court rarely grants certiorari to review lower courts' credibility determinations. But this is a rare case that nonetheless calls for this Court's intervention. The Ninth Circuit's published opinion, positing excuses for deliberative blunders that the agents themselves did not think to make, should not stand as binding precedent in the Ninth Circuit and the fifteen federal districts over which it presides. A precedent that holds deliberate choices do not suffice to evince deliberation as to their natural result undermines the integrity of the federal criminal justice system and should not be allowed to stand.

Conclusion

This Court should grant the writ of certiorari to affirm that a deliberate disregard of Rule 41's service requirement occurs when, during the execution of a search warrant, executing officers disassemble a five-page warrant, disregard repeated requests to provide a copy of the warrant, and serve only the warrant's face-sheet when leaving the searched residence.

Respectfully submitted on October 27, 2022.

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Appendix A

Ninth Circuit's Opinion

United States v. Manaku, 36 F.4th 1186 (CA9 2022)

36 F.4th 1186
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Grant MANAKU, Defendant-Appellant.

No. 20-10069
|
Argued and Submitted February 1, 2021 Honolulu, Hawai'i
|
Filed June 14, 2022

Synopsis
Background: Following denial of defendant's motion to suppress, defendant was convicted in the United States District Court for the District of Hawai'i, Leslie E. Kobayashi, J., of possession of child pornography. Defendant appealed.

The Court of Appeals held that agents' violation of rule governing search warrants in failing to deliver complete copy of search warrant was merely negligent, and thus suppression of evidence seized pursuant to warrant was not required.

Affirmed.

Collins, Circuit Judge, concurred in the judgment and filed opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***1187** Appeal from the United States District Court for the District of Hawaii, Leslie E. Kobayashi, District Judge, Presiding, D.C. No. 1:18-cr-00069-LEK-1

Attorneys and Law Firms

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Marion Percell (argued), Chief of Appeals; Kenji M. Price, United States Attorney; United States Attorney's Office, Honolulu, Hawaii; for Plaintiff-Appellee.

Before: Richard R. Clifton, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

Per Curiam Opinion;

Concurrence by Judge Collins

OPINION

PER CURIAM:

Defendant-Appellant Grant Manaku appeals his conviction for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2). He contends that the district court should have granted his pretrial motion to suppress evidence, which asserted that FBI agents executing a search warrant at his residence deliberately violated Federal Rule of Criminal Procedure 41(f)(1)(C) by failing to supply a complete copy of the warrant. We affirm.

***1188** I

The FBI discovered that a device at a particular IP address contained suspected child pornography files. After several hours of downloading files available for file sharing, an agent downloaded 308 files of horrific child pornography from the device. An administrative subpoena revealed that the IP address was the Dela Cruz residence in Waipahu, Hawai'i, where Manaku resided at that time. Based on these facts, the FBI obtained a search warrant for the Dela Cruz residence from a federal magistrate judge.

When FBI agents executed the search warrant, they first met at an off-site location for briefing, and each reviewed and signed a copy of the five-page warrant. A SWAT team secured the residence, and the search followed. During the near six-hour search, Ms. Dela Cruz asked three or four times to see the warrant but was not given any paperwork until the search ended. Her husband, a retired law enforcement officer, arrived home at one point and also asked to see the warrant. He was briefly shown the warrant's first page but never given a copy. He told the agents to make sure to leave a copy of the warrant or to give one to his wife.

Agent Sherwin Chang was supposed to ensure that both the warrant and a property receipt were left at the residence or with someone at the residence. Chang prepared the property receipt that listed every item that had been seized, and at the end of the search, he reviewed that document with Ms. Dela Cruz. He left her what turned out to be an incomplete copy of the search warrant, with only the warrant's first page but not the single-page Attachment A (which described the residence to be searched) and the three-page Attachment B (which described the items to be seized). [1] This incomplete copy had been included in a "search warrant packet" that had been left for Chang on the Dela Cruz's dining room table by an unidentified agent. Before giving it to Ms. Dela Cruz, Chang turned it over and wrote down the phone number of the FBI's Hawaiʻi field office, so that she could call if she had any questions.

Although Chang had personally reviewed the five-page warrant hours earlier, he testified at the hearing on the motion to suppress that he gave Ms. Dela Cruz the single-page copy without realizing that it was incomplete. Chang could not explain why, despite having written on the back of that single-page copy, he did not notice that it was incomplete. Chang insisted, however, that the error was simply carelessness, he did not intentionally withhold the missing pages, and he was not trying to deceive Ms. Dela Cruz.

The FBI concluded that a laptop seized during the search contained child pornography and that it had been used by Manaku rather than the others in the Dela Cruz household. Manaku was indicted for a single count of possession of child pornography involving minors who were prepubescent or under the age of 12, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2). He moved to suppress the laptop and evidence obtained from it because the failure to supply a complete copy of the warrant violated Federal Rule of Criminal Procedure 41(f)(1)(C) and the Fourth Amendment.

After conducting an evidentiary hearing and receiving supplemental briefing, the ***1189** district court denied the motion to suppress. The court found that the agents had violated Rule 41(f)(1)(C) by failing to leave a complete copy of the warrant at the Dela Cruz residence. The court noted that Manaku had conceded in his supplemental brief that this violation of Rule 41 did not entail a violation of the Fourth Amendment. Despite the clear violation of Rule 41, the district court held that suppression was not warranted because Manaku had not been prejudiced by the error and because there was no "evidence that Agent Chang's failure to give Ms. Dela Cruz a complete copy of the Warrant was intentional or a part of an on-going pattern of behavior by him or other FBI agents." Chang had been "certainly negligent," the court found, but had not intentionally disregarded the rule.

After a five-day jury trial, Manaku was found guilty. The district court sentenced him to 78 months of imprisonment and 10 years of supervised release. Manaku timely appealed.

II

We review the district court's denial of a motion to suppress de novo and its factual finding on that question, made after an evidentiary hearing, only for clear error. *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017).

III

Manaku does not dispute that the complete search warrant of the Dela Cruz residence was properly issued by a magistrate judge under the Fourth Amendment. Rather, his only contention is that in executing the warrant, the agents violated the requirements of Federal Rule of Criminal Procedure 41 and that the evidence seized should have been suppressed. We hold that the district court properly declined to order suppression, even though Rule 41 was violated, because the violation did not merit the remedy of suppression.

A

Rule 41(f)(1) sets forth several specific requirements for the execution of search and arrest warrants. For search warrants, (A) the "exact date and time" of the search must be noted on the warrant; (B) an inventory of property seized must be prepared; (C) a copy of the warrant and a receipt for the property seized must be supplied to the relevant person from whom the property was taken; and (D) the executed warrant and a copy of the inventory must be returned to the designated magistrate judge. Fed. R. Crim. P. 41(f)(1)(A)–(D). As for the third requirement, the officer executing the warrant "must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(1)(C).

Here, by providing only the face page of the warrant without its attachments, the FBI violated Rule 41(f)(1)(C)'s requirement to deliver a complete copy of the warrant. When a search warrant relies on attachments to satisfy the constitutional requirement that the warrant describe with particularity "the place to be searched, and the persons or things to be seized," U.S. Const. amend. IV, those attachments form an essential part of the warrant and must be delivered with the warrant under Rule 41(d). *See* *United States v. Gantt*, 194 F.3d 987, 1000 n.7 (9th Cir. 1999).[2] The warrant to search the Dela ***1190** Cruz residence was incomplete without its attachments, especially Attachment B specifying with particularity the items that could be seized.[3] Thus, the agents violated Rule 41(f)(1)(C) by delivering only the face page of the search warrant rather than a complete copy of the warrant. Indeed, the Government concedes this point on appeal.

B

A Rule 41 violation in the execution of a search warrant, however, does not necessarily mean that the evidence seized during that search must be suppressed. *See* *United States v. Henderson*, 906 F.3d 1109, 1114 (9th Cir. 2018). Suppression is automatic only for "fundamental" violations of Rule 41, at least without any applicable exception to the exclusionary rule. *Id.* at 1115. We have described such "fundamental" violations of Rule 41 as "those that result in clear constitutional violations." *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1283 (9th Cir. 1992). Any other violations of the rule are "technical errors" that "require suppression only if the defendant can show either that (1) he was prejudiced by the error, or (2) there is evidence of 'deliberate disregard of the rule.' " *Henderson*, 906 F.3d at 1115 (quoting *Negrete-Gonzales*, 966 F.2d at 1283).

Manaku contends neither that the violation here was fundamental nor that he was prejudiced by it. This is not, for example, a case in which the agents delivered an incomplete warrant after searching places not authorized by the warrant or seizing items not specified in it. *Cf.* *Negrete-Gonzales*, 966 F.2d at 1283 ("Prejudice in this context means the search would otherwise not have occurred or would have been less intrusive absent the error."). The only remaining question, therefore, is whether the district court correctly concluded that the agents' failure to deliver a complete copy of the warrant at the completion of the search was merely negligent, rather than the product of a "deliberate disregard of the rule." *Id.* We find no error in the district court's conclusion.

Agent Chang had the responsibility to supply the requisite paperwork after the search and had the last chance to catch the error, and the district court therefore properly focused its analysis on his conduct. Chang testified at the evidentiary hearing and was questioned by counsel for both sides, as well as by the district court. The court was troubled that Chang failed to catch the clear mistake in delivering only the face sheet of the warrant, especially given that he turned that single page over so that he could write down the phone number of the FBI's Hawaiʻi field office. But having observed his testimony, the district court chose to credit Chang's assertion that he was negligently oblivious to the error, and the court found that he did not act intentionally. We see no clear error in this finding and nothing in the record that would warrant our setting it aside.

Manaku still asserts that the district court failed to adequately consider the possibility that another agent—such as the unidentified agent who left the incomplete copy for Manaku in the "search warrant packet"—had deliberately disregarded Rule 41(f)(1)(C) by unstapling the pages of the warrant and leaving only an incomplete ***1191** copy. Manaku argues that other agents' withholding of the warrant was deliberate disregard because they were reminded of the need to give a complete warrant after being asked for it several times and therefore not giving the complete warrant at the end of the search could not have been an accident. *See* *Gantt*, 194 F.3d at 1005.[4]

We reject this contention. Reviewing the record as a whole, the district court rejected the idea that Agent Chang's failure to give Ms. Dela Cruz a complete copy of the warrant was intentional or a part of an on-going pattern of behavior "by him or other FBI agents." The court likewise stated that "the agents' violation of Fed. R. Crim. P. 41(f)(1)(C) ... was not deliberate," because the other agents' refusal to supply the warrant earlier would be equally consistent with an intention to defer to the agent in charge of delivering the paperwork at the end of the search—Agent Chang. There is no non-speculative basis to infer that the agents expected (much less hoped) that Agent Chang would fail to do so. Without clear indication in the record as to how the incomplete copy came to be included in the search warrant packet, we cannot say that the district court clearly erred in declining to find that it resulted from a deliberate attempt to violate Rule 41.

The district court properly concluded that because Manaku had not carried his burden to show a "deliberate disregard of the rule," the costly judicial remedy of suppression was not warranted in this case. *Henderson*, 906 F.3d at 1115 (citation omitted); *cf.* *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."); *United States v. Hector*, 474 F.3d 1150, 1154–55 (9th Cir. 2007) (even assuming "the failure to serve a copy of the warrant was a violation of the Fourth Amendment, the exclusionary rule should not be applied" since the "causal connection between the failure to serve the warrant and the evidence seized is highly attenuated" and "the social costs of excluding relevant evidence obtained pursuant to a valid search warrant are considerable").

* * *

Accordingly, we **AFFIRM** the denial of Manaku's motion to suppress and, as a result, his conviction and sentence.

COLLINS, Circuit Judge, concurring in the judgment:

We held in *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), that (1) Federal Rule of Criminal Procedure 41 "requires officers to give" an occupant whose premises are being searched "a complete copy of the warrant at the outset of the search"; (2) the agents in *Gantt* engaged in a deliberate violation of Rule 41 by "fail[ing] to show Gantt the complete warrant *even after she asked to see it*"; and (3) this deliberate refusal to supply the warrant upon demand, or at the outset, "requires suppression." *Id.* at 1005 (emphasis added). As the majority notes, all parties agree that the *first* of these three holdings was overruled by the Supreme Court's decision in *United States v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006). *See* Opin. at 2 n.4. But if *Gantt* nonetheless remains good law on the second and third ***1192** points, then in my view the district court's denial of Manaku's motion to suppress must be reversed. By refusing at least four direct requests from the property owners to produce the warrant during the search, the agents here deliberately and repeatedly violated Rule 41, as construed in *Gantt*, and *Gantt* therefore would require suppression. Indeed, even the Government acknowledges in its brief that, under *Gantt*, "the act of refusing to show a warrant after receiving a request for it *would* be deliberate and intentional."

However, if *Grubbs* also overruled *Gantt*'s holding that Rule 41 requires agents to produce the warrant *upon request* during the search, then the only violation of Rule 41 in this case would be Agent Chang's omission of the warrant's additional pages when he left behind a copy at the conclusion of the search. In that circumstance, I would agree with the majority's conclusion that the district court did not clearly err in finding that Agent Chang's error was negligent rather than intentional and that suppression was not warranted.

Consequently, whether to affirm or reverse the judgment in this case turns entirely on the continued vitality of *Gantt*'s holding that Rule 41 requires production of the warrant upon demand during the search. We therefore cannot avoid deciding that issue.[1] Because I conclude that *Grubbs* overruled that aspect of *Gantt* as well, I concur in the judgment affirming the district court's denial of Manaku's motion to suppress.

I

Federal Rule of Criminal Procedure 41 provides that the "officer executing the warrant" must do one of two things: (1) "give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken" or (2) "leave a copy of the warrant and receipt at the place where the officer took the property." *See* FED. R. CRIM. P. 41(f)(1)(C). Despite the rule's clear use of alternative language in describing these two options for providing a copy of the warrant, *Gantt* expressly rejected the view that "leaving the warrant behind after the search always suffices." ***1193** 194 F.3d at 1001. Instead, we held that, "[a]bsent exigent circumstances, Rule 41(d) requires service of the warrant at the *outset* of the search on persons present at the search of their premises."[2] *Id.* (emphasis added). We explained that such at-the-outset notice was necessary in order to ensure that the subjects of the search were "assure[d]" of the scope of the agents' authority under the warrant, so that those subjects would have "the opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence." *Id.* at 1001–02. "A warrant served after the search is completed," we reasoned, cannot fulfill such purposes. *Id.* at 1002. Applying that holding to the facts of *Gantt*, we held that the agents there "deliberate[ly]" violated Rule 41 by "fail[ing] to show Gantt the complete warrant *even after she asked to see it.*" *Id.* at 1005 (emphasis added). Manaku correctly notes that this holding is "[d]irectly on point" here. I turn, therefore, to the Government's contention that the Supreme Court's decision in *Grubbs* overruled this show-on-demand aspect of *Gantt* as well.

In *Grubbs*, federal officers obtained a search warrant for Grubbs's residence after submitting an affidavit to a magistrate judge explaining that, if granted, the warrant would not be executed until a planned controlled delivery of child pornography to that residence was first completed. 547 U.S. at 92, 126 S.Ct. 1494. After carrying out the controlled delivery, the officers then executed the search warrant and seized a variety of items, including the tape that had just been delivered (which Grubbs had ordered from a website operated by an undercover agent). *Id.* at 92–93, 126 S.Ct. 1494. About 30 minutes into the search, the agents provided Grubbs with a copy of the warrant, but they did not give him a copy of the supporting affidavit that mentioned that execution of the warrant was conditioned on completion of the controlled delivery. *Id.* at 93, 126 S.Ct. 1494.

On appeal from Grubbs's ensuing conviction for receiving child pornography, we held that the Fourth Amendment required that "the triggering conditions of an anticipatory search warrant" must "appear either on the face of the warrant itself" or in its attachments. *United States v. Grubbs*, 377 F.3d 1072, 1078 (9th Cir. 2004), *as amended*, 389 F.3d 1306 (9th Cir. 2004). We further held that the Fourth Amendment required that, if the triggering conditions were set forth in a separate document, such as an affidavit, then that document "must be presented to the person whose property is being searched." *Id.* at 1079. "Absent such presentation," we held, "individuals would stand no real chance of policing the officers' conduct, because they would have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred." *Id.* (simplified). And because we held that the Fourth Amendment itself required such presentation, we did not find it necessary to rely on Rule 41. *See id.* at 1073 n.1. We noted, however, that *Gantt* had squarely held that, under Rule 41(d), the executing agents are required to provide "a complete copy of the warrant at the outset of the search." *Id.* at 1079 n.9 (quoting *Gantt*, 194 F.3d at 994). The Supreme Court reversed. *Grubbs*, 547 U.S. at 97–99, 126 S.Ct. 1494.

As an initial matter, the Court held that the Fourth Amendment's specification of what must be included with particularity in the warrant extends only to " 'the place to ***1194** be searched' and 'the persons or things to be seized,' " and "does *not* include the conditions precedent to execution of the warrant." *Id.* at 97–98, 126 S.Ct. 1494 (quoting U.S. CONST., amend. IV) (emphasis added). We therefore erred, the Court concluded, in holding that the Fourth Amendment required that the warrant "specify the triggering condition." *Id.* at 97, 126 S.Ct. 1494.

The Court further held that we had also erred in stating that, in order to give the property owner a "chance of policing the officers' conduct," the "executing officer must present the property owner with a copy of the warrant *before* conducting his search." *Id.* at 98–99, 126 S.Ct. 1494 (emphasis added) (citation and internal quotation marks omitted). In reaching this conclusion, the Court specifically cited—and rejected—the reasoning in a footnote in our opinion in *Grubbs* that had relied on *Gantt*. *Id.* at 98–99, (citing *Grubbs*, 377 F.3d at 1079 n.9). "In fact," the Court held, "neither the Fourth Amendment *nor* *Federal Rule of Criminal Procedure 41* imposes such a requirement." *Id.* at 99, 126 S.Ct. 1494 (emphasis added). In holding that there is no such right, as we had posited, to receive a warrant in time to contemporaneously police the agents' execution of the search, the Court made two points, both of which are pertinent here.

First, the Court stated that "[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search, *or indeed until the search has ended*, is ... evidence that the requirement of particular description does not protect an interest in monitoring searches." *Id.* at 99, 126 S.Ct. 1494 (quoting *United States v. Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999) (emphasis added) (ellipses added by Court)). Of course, the statement that the warrant need not be supplied "until the search has ended" is directly contrary to our holding in *Gantt.* Second, the Court held that a contemporaneous debate between the property owner and the officers executing the search is *not* one of the methods by which the Constitution (or Rule 41) seeks to protect against unreasonable searches:

> The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer ... between the citizen and the police," and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.

Grubbs, 547 U.S. at 99, 126 S.Ct. 1494 (citation omitted) (ellipsis in original). Notably, the interests identified by the Court are fully satisfied by delivering a copy of the warrant at the *conclusion* of the search.

The Supreme Court in *Grubbs* thus expressly rejected both our reading of Rule 41 in *Gantt* and our rationale for that reading. Accordingly, *Gantt*'s holding that Rule 41 requires service of the warrant at the outset of the search, or in response to a direct request during the search, is no longer good law. *See* *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc).

As I noted earlier, *see supra* note 1, Manaku contended at oral argument that *Grubbs* overruled *Gantt* only to the extent that it held that the warrant must generally be produced at the *outset* of the search. Manaku insisted that *Grubbs* did not undermine *Gantt*'s further holding that the warrant must be produced upon a specific request, and in support of that view he pointed to Justice Souter's separate opinion concurring in the judgment in relevant part in *Grubbs.* This contention fails. Although Justice Souter argued that the ***1195** Court's decision somehow left open the question whether an owner has a right to "demand to see a copy of the warrant before making way for the police," 547 U.S. at 101, 126 S.Ct. 1494 (Souter, J., concurring in judgment in part), the majority's analysis on this issue—which Justice Souter did not join—cannot be reconciled with that view.

As explained above, the Court's rationale for rejecting *Gantt*'s produce-at-the-outset rule was that there is no requirement to deliver the copy of the warrant "until the search has ended," *see* *id.* at 99, 126 S.Ct. 1494 (citation omitted), and *that* rationale cannot be squared with *Gantt*'s produce-upon-demand rule either. Moreover, the *Grubbs* majority expressly rejected the premise—on which *Gantt*'s deliver-on-request holding was based—that the Constitution or Rule 41 gives owners a "license to engage the police in a debate over the basis for the warrant." *Id.* Contrary to the *Grubbs* majority's holding on this point, Justice Souter affirmatively endorsed the view that "showing an accurate warrant" during the search "reliably 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.' " *Id.* at 101, 126 S.Ct. 1494 (Souter, J. concurring in judgment in part) (citation omitted). A concurrence in the judgment that criticizes the breadth of the majority's reasoning, declines to join it, and purports to limit it, cannot detract from what the majority actually said. *Cf. Local 1545, United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Vincent*, 286 F.2d 127, 132 (2d Cir. 1960) (Friendly, J.) (noting that "dissenting opinions are not always a reliable guide to the meaning of the majority").

Indeed, Justice Souter declined to join the relevant portion of the *Grubbs* majority precisely because he thought that it undervalued "an owner's interest" in obtaining "an accurate statement of the government's authority to search property" before the search was completed. 547 U.S. at 101, 126 S.Ct. 1494 (Souter, J., concurring in judgment in part).

I therefore conclude, in accordance with *Grubbs*, that Rule 41(f)(1)(C) is satisfied if, at the end of the search, the agents *either* give a copy of the warrant to the property owner or leave it at the premises. The agents here thus did not violate Rule 41 in declining to supply Ms. and Mr. Dela Cruz with a copy of the warrant during the execution of the search.

II

It follows from the foregoing that the only violation of Rule 41 that occurred here was the failure to leave a complete copy of the warrant after the search had been completed. As to that sole violation, I agree with the majority that the district court did not clearly err in concluding that it was unintentional. Manaku's motion to suppress was therefore properly denied.

For these reasons, I concur only in the judgment.

All Citations

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Footnotes

1 Although the record is not entirely clear, the copy of the face page of the warrant that Chang supplied to Ms. Dela Cruz apparently had no pre-printed material where an executing agent could certify the inventory of property seized as well as the return of the warrant.

2 *Gantt* was later explicitly overruled on a separate point, relating to the jurisdictional requirements for an interlocutory appeal of a suppression order under 18 U.S.C. § 3731. *United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

3 The face page of the warrant here arguably did sufficiently describe the place to be searched, because it disclosed the building address of the house to be searched in the caption of the document. The text of the warrant described the place to be searched by referring to an Attachment A, which repeated that same address, further described the structure, and included a photograph.

4 The Government contends that *United States v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006), overrules *Gantt.* But Manaku cites *Gantt* only to show that the Rule 41 violation discussed above was deliberate, conceding that *Grubbs* overruled *Gantt*'s pre-search presentment requirement.

1 The majority acknowledges that the Government's answering brief squarely raised the issue of whether this aspect of *Gantt* was overruled by *Grubbs*, but it nonetheless insists that Manaku's opening brief did not place the issue before us. According to the majority, Manaku's opening brief conceded that *Grubbs* overruled *Gantt*'s "*pre-search* presentment requirement," and his brief cited *Gantt* only to make the narrower argument that the agents' earlier refusals to produce the warrant show that *Agent Chang's later refusal to leave behind the complete warrant* must be considered to be deliberate. *See* Opin. at 10 n.4 (emphasis added). Thus, in the majority's view, Manaku's brief does *not* contend that there were multiple

violations of Rule 41, but only that Agent Chang's single violation of that Rule at the end of the search was deliberate. That is wrong. In his opening brief, Manaku carefully conceded *only* that *Grubbs* had overruled *Gantt*'s show-at-the-outset holding. As to *Gantt*'s *show-on-demand* holding, Manaku expressly quoted the relevant language from *Gantt* and argued that this "precedent requires suppression here too," in part "because agents inexplicably disregarded repeated requests to produce the warrant." After the Government's brief argued in response that *Grubbs* overruled *Gantt*'s show-on-demand holding as well, Manaku's reply brief unsurprisingly focused on the aspects of his argument that would survive such a conclusion, but it did not abandon the point or concede that the Government was correct. On the contrary, when specifically asked at oral argument, Manaku confirmed that, in his view, "*Grubbs* specifically left open the question of whether agents are required to produce the warrant *upon the request of the homeowner*" (emphasis added). The continued validity of this aspect of *Gantt* is thus squarely presented here.

2 At the time, the relevant language of Rule 41 was contained, with immaterial differences in phrasing, in subdivision (d) of the rule.