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Anticipatory Search Warrants: Constitutionality, Requirements, and Scope

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Anticipatory Search Warrants: Constitutionality, Requirements, and Scope

BY JAMES A. ADAMS*

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INTRODUCTION

Over the years, a substantial number of people have heard a knock on the door accompanied by the ominous announcement of police authority to enter and search. A small but recently growing number of those searches have been conducted under the authority of "anticipatory search warrants." Unfortunately, the term "anticipatory search warrant" sounds like a shorthand phrase for a constitutional violation.

An anticipatory search warrant generally is a warrant conditioning a search on an event that is to occur after issuance of the warrant. For example, an anticipatory search warrant may be issued for narcotics at a specified premises with execution of the warrant conditioned on a future controlled delivery of narcotics to that place. The anticipated event may be, but need not be, a prerequisite to probable cause to search.

The immediate concerns raised by use of anticipatory warrants are the following: (1) whether the warrant can ever satisfy the fourth amendment requirement that "no warrants shall issue, but upon probable cause"; (2) if not per se invalid under the fourth amendment, what information will be required to establish validity; (3) what discretion is given to the executing police officer to determine whether the condition creating the probable cause or right to execute the warrant has occurred; (4) what are appropriate limits on the scope of the search; and (5) whether the good faith exception will apply to issuance or execution of an invalid anticipatory warrant. An additional issue, considering the purposes of an antici-

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2 For a discussion of definitions, see infra notes 8-18 and accompanying text.
patory search warrant together with the realities of drug trafficking, is whether the warrant must always specify a particular place to be searched.

This Article defines anticipatory warrants through a discussion of the numerous scenarios in which warrants have been labeled anticipatory. The Article then focuses on the validity of anticipatory warrants by analyzing Supreme Court precedent that appears to approve the concept and by reviewing recent amendments to the Federal Rules of Criminal Procedure that acknowledge at least the limited validity of anticipatory warrants. Assuming there are no constitutional or statutory prohibitions against anticipatory warrants, this Article examines the validity of anticipatory warrants as currently issued. The validity evaluation includes the purposes of anticipatory warrants and available alternatives in various cases, as well as the appropriate quantum of information necessary to establish probable cause in those situations. Additionally, assuming an anticipatory warrant has been invalidly issued in a particular case, the Article discusses the need for careful application of the good faith exception to protect judicial decisions but not to prevent review of discretionary decisions of police. Finally, the Article demonstrates that appropriately limited anticipatory warrants support fourth amendment policy goals as long as there are guidelines to limit police discretion as to time, place, and scope of the search. The availability of anticipatory warrants may serve to limit governmental opportunity to rely on non-warrant exceptions to the fourth amendment.

I. Definition of an Anticipatory Warrant

Courts have labeled search warrants as anticipatory in a variety of fact situations. Some cases state that 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. That definition can be

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3 See infra notes 8-18 and accompanying text.
4 See infra notes 23-75 and accompanying text.
5 See infra notes 76-126 and accompanying text.
6 See infra notes 127-34 and accompanying text.
7 See infra notes 135-44 and accompanying text.
interpreted to limit anticipatory search warrants to situations where there is no probable cause to search independent of the anticipated event. Both probable cause that the specified seizable evidence will be on the premises to be searched and execution of the search warrant are theoretically contingent upon the occurrence of a future event.

Alternatively, it also can be argued that this definition requires only a showing of probable cause that a specified item will be present on the premises in the future. This interpretation does not necessarily preclude, at issuance, the existence of probable cause that other seizable evidence is currently on the premises to be searched and thus does not necessarily require the occurrence of the future event to justify execution of the warrant. Neither interpretation, however, fully defines the situations in which warrants have been labeled anticipatory

The future event in the context of anticipatory warrants is almost always some type of delivery of contraband or other seizable evidence to the premises listed in the warrant. For example, assume government agents validly intercept a shipment of cocaine addressed to a specific person at a specific location. Agents may then arrange a so-called "controlled delivery" to the addressee. In one form of controlled delivery, government agents dressed as postal employees hand deliver the shipment to the addressee. If the affidavit in support of a search warrant for the address on the package indicates that government agents will make a controlled delivery, then the magistrate may conclude, prior to delivery, that upon delivery there will be probable cause to believe that there is seizable evidence at the specified address. On that basis, the magistrate may issue a search warrant whose probable cause and execution are conditioned upon the anticipatory future event, i.e., delivery. Between issuance of the warrant and its execution, the

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* For a discussion of deliveries, see infra notes 81-97 and accompanying text.

** This fact scenario is like that found in McGriff, 678 F. Supp. at 1010.

*** In some situations, the acceptance of a delivery may be a necessary element of an offense. Acceptance of the delivery gives probable cause as to an offense and probable cause that evidence of the offense is now on the premises. One example is knowing receipt through the mail of visual depictions of minors engaged in sexually explicit conduct. See 18 U.S.C. § 2252(a)(2) (1984 & Supp. 1990). Until the defendant receives the material, no crime has been committed. Once there is receipt, however, the crime has been committed and the delivered material is evidence of the offense. United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988), cert. denied, ___ U.S. ____, 109 S. Ct. 1639 (1988).
executing officer need not return to the issuing magistrate to advise the magistrate that the conditional event has occurred.\textsuperscript{12}

In the example above, government agents had no information about the addressee or the address of the shipment other than that provided by the shipment itself. Frequently, however, agents suspect,\textsuperscript{13} or may already have probable cause to believe, that the addressee is engaged in criminal activity or that the address is being used to facilitate or conceal criminal activity. In those situations, the valid interception of a shipment of contraband addressed to a suspect, or suspect address, may give agents probable cause independent of any future event to search immediately for other evidence.\textsuperscript{14} The future event (delivery of contraband) is not the genesis of probable cause to search for the other evidence. Instead, a judicially imposed delivery requirement prior to execution of the warrant makes that future event serve merely as the triggering mechanism that permits execution of the warrant to search both for the recently delivered contraband and other evidence relating to the suspected offense.\textsuperscript{15} Warrants that require the occurrence of the future event to establish probable cause as well as warrants that merely use the future event to trigger execution have been labeled anticipatory\textsuperscript{16}

\textsuperscript{12} United States v. Segovia, 800 F.2d 39, 42 (2d Cir. 1986) (states that after issuance of an anticipatory warrant to be executed within one hour of the anticipated (uncontrolled) delivery, "law enforcement officers need report back new or correcting information only when that information is material to the magistrate's determination of probable cause"). In United States v. Moore, 742 F Supp. 727, 736 (N.D.N.Y. 1990), failure to maintain observation of the container to be delivered, under circumstances suggesting that a confederate of defendant was aware of police surveillance, was a material change of circumstances that had to be reported to the magistrate.

\textsuperscript{13} See United States v. Goodwin, 854 F.2d 33 (4th Cir. 1988) (various investigatory means used to identify defendant as an appropriate target of an operation to discover the names of persons receiving child pornography through the mail).

\textsuperscript{14} See Moore, 742 F Supp. at 733 (The court ruled that the warrant could be divided into two parts: an anticipatory aspect relating to the future delivery, and a non-anticipatory aspect relating to evidence expected to be on the premises independent of the future delivery.).

\textsuperscript{15} Merely because police have probable cause to search does not mean the search must take place at the earliest possible moment. Even after issuance of a search warrant, police may execute within the statutorily defined time period, commonly 10 days, as long as probable cause continues to exist. See W LAFAVE, supra note 8, at § 4.7. Police have discretion to execute an authorized search at a time most likely to produce the evidence sought.

\textsuperscript{16} See United States v. Peden, 891 F.2d 514 (5th Cir. 1989). In Peden, based on extensive past information concerning defendant and information concerning pedophiles and persons receiving materials detailing the sexual exploitation of children, the court found that agents had probable cause for an extensive search of defendant's premises for circum-
A third common situation—a hybrid of the first two—occurs in prosecutions for receipt of child pornography through the mail. There may be probable cause to believe that there is already seizable non-contraband evidence on the premises at the time the warrant is issued but there is no crime or basis to enter the premises until future delivery of the child pornography. Delivery is the basis for probable cause to believe that a crime has been committed and for the search of the premises.

A definition of an anticipatory warrant arguably broader than that presented by LaFave and more readily fitting the variety of anticipatory warrant cases was utilized in United States v. Garcia:

"An anticipatory warrant, by definition, is a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void." The definition in Garcia is not based on the premise that the government lacks probable cause unless the future event occurs. Rather, it prohibits the intrusion until a specified future event occurs.

II. CONCEPTUAL VALIDITY OF ANTICIPATORY WARRANTS

Under the Garcia definition, there are two general forms of anticipatory search warrants. One form requires the occurrence of substantial evidence of the anticipated offense. However, a controlled delivery of sexually explicit material involving minors was the required trigger for the search. Id., see also Garcia, 882 F.2d at 704 (In evaluating the scope of a search pursuant to an anticipatory warrant, the court noted that "[h]ere, however, additional facts in the supporting affidavit gave rise to probable cause that the apartment was being used as a storage and distribution center for drugs."); United States v. Boffardi, 684 F. Supp. 1263, 1265 (S.D.N.Y. 1988) (defendant had been identified as a consumer of hardcore child pornography prior to a controlled delivery); Gutman, 670 P.2d at 1169 (search conditioned on a future event, although prior to issuance of the warrant there was probable cause to believe defendant was involved in illicit drug activity and that the premises were used for illicit drug distribution).

Note that varying degrees of certainty of delivery may have an impact on whether the warrant should be either issued or executed. See infra notes 81-97 and accompanying text.  

17 See supra note 8 and accompanying text.  

18 882 F.2d at 702; see also Moore, 742 F. Supp. at 733 ("[T]he warrant was anticipatory insofar as it sought to recover the two packages which were to be delivered to the defendant’s residence. However, insofar as the warrant sought records or documents related to the delivery of the two packages it was not contingent upon the delivery of the packages and was therefore, in that aspect, non-anticipatory."); Commonwealth v. Reversa, 563 A.2d 1252, 1256 (Pa. Super. Ct. 1989) (Although the warrant as issued was not contingent upon any future event, the court reviewed the warrant as if it were anticipatory because it was issued shortly before an anticipated delivery and execution was unlikely until after the delivery.). But see Rivera v. United States, 728 F. Supp. 250, 257 (S.D.N.Y. 1990) (suggesting that a warrant requested and issued on the day of the anticipated event is not properly categorized as an anticipatory warrant).
a future event to establish probable cause for the search. The other form requires the future event as a precondition to the search but not as a precondition to probable cause. Both forms require a specified future event prior to execution of the warrant.

Recent cases are virtually unanimous in holding that anticipatory search warrants are not invalid per se under the fourth amendment. As is discussed in this section, the language of the fourth amendment does not preclude anticipatory warrants, and Supreme Court opinions and anticipatory elements of conventional warrants support the validity of anticipatory search warrants. Further, recent amendments to Federal Rule of Criminal Procedure 41 and the purposes served by such warrants suggest Supreme Court approval of anticipatory warrants.

A. Fourth Amendment

The fourth amendment states that "no warrants shall issue, but upon probable cause." Defendants have argued that the

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20 U.S. Const. amend. IV
fourth amendment requires probable cause that the suspect item is currently on the premises to be searched.21 Rejecting this interpretation, courts suggest that the fourth amendment does not necessarily require that all of the events generating the probable cause already have occurred at the time the warrant is issued.22 The primary goals of the warrant process are to interpose a neutral and detached judicial officer between potentially overzealous government agents and the private citizen and to ensure that the agents who invade an individual’s privacy do so only when probable cause exists at the time of the intrusion. Merely because the “fact” justifying the intrusion has not occurred when the warrant is issued does not affect the magistrate’s decision-making process in considering the likelihood that the “fact” will occur and that probable cause will exist at the time of the warrant’s execution. In that context, a probable cause determination is made when the warrant is issued.

B. Supreme Court Opinions

Although there are numerous lower court opinions, the United States Supreme Court has not directly considered the validity of anticipatory search warrants. The Court has approved an arguably

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21 Berger v. New York, 388 U.S. 41, 55 (1967) (States that probable cause exists “where the facts and circumstances within the affiant’s knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.”). Relying on the “has been or is being committed” language from Berger, the defendant in Skaff, 418 F.2d at 430, challenged the validity of an anticipatory warrant. The court rejected the challenge asserting that the primary problem to be avoided was a premature search, one occurring before the commission of the crime alleged or possession of the goods to be seized. Where there is no danger that the property seized is any other than that for which the search is authorized, there is sufficient judicial control of the search to satisfy the fourth amendment.

22 Garcia, 882 F.2d at 702 (“Thus, the fact that the contraband is not ‘presently located at the place described in the warrant’ is immaterial, so long as ‘there is probable cause to believe that it will be there when the search warrant is executed.’”); Washington, 852 F.2d at 804 (“Appellant’s argument that there was no probable cause to issue the warrant because, at the time the warrant was signed, there was no evidence that the heroin was on the premises or that the controlled delivery would actually succeed, is unpersuasive. ‘When evidence . . . is on a sure course to its destination, as in the mail, the prior issuance of a warrant is permissible.’”); Goff, 681 F.2d at 1240 (“Our concern is that probable cause exist at the time of the search.”); Lowe, 575 F.2d at 1194 (“Contraband does not have to be presently located at the place described in the warrant if there is probable cause to believe that it will be there when the search warrant is executed.”); Reviera, 562 A.2d at 1252.
analogous concept. In *Draper v United States*, an arrest case, police had information from a reliable informant predicting Draper's future conduct. The informant described Draper in detail, including the clothing he would be wearing as well as the type and color of bag he would be carrying when he arrived in Denver by train on one of two days. The informant also predicted that Draper would be walking fast and carrying heroin.

Officers waited at the train station on the two designated days. On the second day they observed an individual matching the informant's description and verified the details of the predicted future conduct. The officers, however, never observed any illegal activity. Nevertheless, the Court ruled that the officers could arrest Draper because verification of most of the informant's statements constituted probable cause that the reported criminal activity also was taking place. The occurrence and verification of previously anticipated conduct supplied probable cause to make an arrest.

Further, the Court relied on the officers' after-the-fact testimony that the conditions precedent to probable cause (verification of the informer's information) had occurred. The officers had some discretion to determine if a sufficient quantity of the anticipated events had been verified.

Although *Draper* specifically addressed probable cause to arrest, the underlying concern was a search issue. Until Draper was searched incident to his arrest, police had no evidence that Draper was violating the law. Unlike many other arrests where there is independent information about criminal involvement, prosecution of Draper depended entirely on the results of the search incident to arrest. In effect, the police were determining probable cause to search.

Nevertheless, *Draper* left unclear whether the Court would have validated a warrant to search or arrest Draper if the warrant had been issued prior to his arrest and was conditioned on the verification of the future events. The issue then would not be the existence of probable cause after verification but whether police could get a warrant conditioned on verification. In *Spinelli v United States*, the Court indicated in dicta that in the *Draper*

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24 Although public arrests without a warrant are generally permissible, United States v. Watson, 423 U.S. 411 (1976), reliance on police officers to determine if conditions necessary to arrest have occurred is much the same as allowing an officer with an anticipatory warrant to determine if the triggering event has occurred.
situation it would have validated the issuance of an arrest warrant prior to verification.25

Such a warrant clearly would have been anticipatory since the police did not know which individual to arrest until they observed a future event, a person arriving by train on a specific morning, who matched the description given by the informer. The police were the final arbiters of whether the condition (matching description and conduct) triggering probable cause and execution was sufficiently demonstrated.

In Draper, a conditional arrest or search warrant would have satisfied one of the purposes of the warrant process. Prior to intrusion by police, the officers could have given the relevant information to the magistrate for a determination whether the predicted conduct, even if verified, provided probable cause to justify an arrest or search.

C. Anticipatory Element of All Search Warrants

When considering the fourth amendment validity of anticipatory warrants, the mere process of describing one type of search warrant as "anticipatory" suggests that it is significantly different from conventional search warrants and requires closer constitutional scrutiny. That suggestion, however, may be misleading be-

25 Spinelli v. United States, 393 U.S. 410, 416-17 (1969). In a discussion of the sufficiency of information from an undisclosed informant to establish probable cause to search, the court stated,

The detail provided by the informant in Draper v. United States, 358 U.S. 307 (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford, went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.

In his concurring opinion Justice White stated,

So too in the special circumstances of Draper v. United States, (citation omitted) the kind of information related by the informant is not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him. The informant, posited as honest, somehow had the reported facts, very likely from one of the actors in the plan or as one of them himself. The majority's suggestion is that a warrant could have been obtained based only on the informer's report. I am inclined to agree,

Id. at 426 (White, J., concurring) (emphasis added).
cause virtually all search warrants are anticipatory in some respects. Most search warrant affidavits present historical information, gained either by direct observation or through inference, providing probable cause to believe that at the time the observation was made or the information obtained there was probable cause to believe that seizable items were on the premises to be searched. Based on these past events, the magistrate anticipates that the seizable evidence will remain on the premises until execution of the warrant.

Also, in some situations, including many drug searches, police and the issuing magistrate understand that the specific drugs that were observed on the premises on one occasion are not the same ones that will be on the premises when the warrant is executed. Instead, if drug distribution from the location listed in the warrant appears to be an ongoing business, it is expected that the dealer will have replaced the observed drugs with a new supply. The issuing magistrate, based on the historical information and because of the nature of the drug trade, anticipates that some narcotics will be on the premises when the warrant is executed. The same analysis applies to a fencing operation where stolen items are constantly coming in and going out of the premises. Specific items observed on the premises on day one may not be there on day ten. Yet based on the nature of continuing fencing operations, there may be probable cause to believe stolen property will be on the premises on day ten.

In another context, court orders authorizing a wiretap on an individual's telephone are based on historical probable cause to believe that an individual is currently engaged in criminal activity and it is probable that additional evidence of the criminal activity will be obtained through a wiretap. Wiretap authorization is not

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Upon such application the judge may enter an ex parte order, as requested or modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or
based on the potential creation of probable cause, nor is it contingent on a future event; instead, it is based on current probable cause with the anticipation that additional evidence of the ongoing criminal activity will be created. The wiretap authorization bears some relationship to an anticipatory warrant because both authorize seizure of evidence not currently at the location. With an anticipatory warrant, however, no intrusion takes place until some future event occurs. The wiretap intrusion is not conditioned on the occurrence of any future event and is not within the previously mentioned definitions of anticipatory warrants.27

In Illinois v. Gates,28 a case somewhat analogous to Draper v United States,29 the search warrant was based on an anticipated conclusion.30 Police received an anonymous letter that suggested the author's fairly close contact with the defendants. The author predicted the defendants' future conduct, which included picking

reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in name of, or commonly used by such person.

See United States v. Kirk, 534 F.2d 1262, 1273 (8th Cir. 1976), cert. denied, 430 U.S. 906 (1977); United States v. Errera, 616 F Supp. 1145, 1148-49 (D. Md. 1985); see also United States v. Cuevas-Sanchez, 821 F.2d 248, 252 (5th Cir. 1987) (using wiretap rules as a guideline for video surveillance, the court found probable cause to search and authorized video surveillance since other investigative techniques did not disclose enough evidence to convict defendant).

27 It has been suggested that wiretap authorizations are anticipatory warrants because the evidence to be seized is not yet in existence at the time of issuance of the warrant. See W. LAFAVE, supra note 8, at § 3.7(c), at 97. A major distinction between a wiretap authorization and an anticipatory warrant is that with a wiretap, the intrusion by police is based on existing probable cause and occurs without regard to the occurrence of any future event. It is during the valid intrusion by wiretap that additional evidence becomes available. In the anticipatory warrant situation, no intrusion is authorized until some additional event takes place.


29 358 U.S. at 307; see supra notes 23-25 and accompanying text.

30 The major difference between Gates and an anticipatory warrant is that in Gates the non-criminal predicted conduct was verified and reported to the magistrate. Therefore, probable cause was no longer dependent on a future event. In United States v. Goff, 681 F.2d 1238 (9th Cir. 1982), police observed conduct consistent with an informer's report that the defendant was in Florida to purchase drugs and transport the drugs back to Washington. The officers did not see the defendant purchase or possess drugs. Nevertheless, once the defendant was on a non-stop flight to Washington, agents obtained a search warrant for defendant's person to be executed when he arrived in the issuing district. As in Gates, all events pertaining to probable cause had occurred. Execution was dependent on a future event, i.e., arrival of defendant in Washington. See infra notes 69-71 for a discussion of whether an anticipatory warrant could have been issued in the Gates situation.
up and transporting a shipment of drugs. Agents observed much
of the predicted conduct. However, no criminal activity was ob-
served. Much like Draper, there was no available proof, independ-
ent of a search, that the defendants violated the law. Nevertheless,
the Court concluded that based on verification of the predicted
non-criminal conduct, the magistrate’s determination of probable
cause was accurate.

In each of the previous examples, the issuing magistrate makes
an evaluation of historical probable cause and from that anticipates
the existence of future status, the seizable item remaining on the
premises. Recognition of that anticipatory element of conventional
search warrants is demonstrated by the many probable cause chal-
lenges to warrants based on the theory that the facts presented in
the affidavits did not support the magistrate’s anticipation that
seizable items would be on the premises when the warrants were
executed.

The best illustration of a warrant’s anticipatory element is the
frequent claim that probable cause is based on stale information.
A staleness challenge asserts that, regardless of the accuracy of the
historical fact in the affidavit and regardless of the conclusion that
probable cause may have existed at one time, the passage of time
makes it unreasonable to believe the item sought will still be on
the premises by the time the warrant issues or the search occurs.31

31 See, e.g., Sgro v. United States, 287 U.S. 206 (1932). The Court held that reissuance
of a search warrant was improper where the underlying information was not brought up to
date so that the issuing judicial officer could conclude that probable cause then existed. See
W. LaFave, supra note 8, at § 3.7(a). Under Fed. R. Crim. P 41(c)(1), a warrant may be
executed within a specified time up to 10 days after issuance. Execution within the statutory
period also may be invalid if the government agents learn of information negating the basis
for the probable cause finding:

Certain restrictions are placed on the execution of search warrants to
ensure that probable cause, as well as the veracity of the information in the
affidavit, exists when the warrant is executed. Fed. R. Crim. P 41(c) mandates
that a search warrant must be executed within ten days of issuance. Unrea-
sonable delay in execution of the warrant that results in the lapse of probable
cause will invalidate a warrant. Thus, when a definite and material change
has occurred in the facts underlying the magistrate’s determination of probable
cause, it is the magistrate, not the executing officers, who must determine
whether probable cause still exists. Therefore, the magistrate must be made
aware of any material new or correcting information.

United States v. Marm-Buitrago, 734 F.2d 889, 894 (2d Cir. 1984) (emphasis in original); see Segovia, 800 F.2d at 39; United States v. Nepstead, 424 F.2d 269 (9th Cir. 1970), cert.
In Skaff, 418 F.2d at 430, the court recognized that undue delay in the execution of
a warrant could cause the warrant to become stale. The prompt execution required is to
Staleness goes directly to the anticipatory element common to most warrants—that based on historical information it is probable that the item (or its replacement) will still be on the premises.

Although most search warrants have an anticipatory element, those search warrants whose execution is conditioned on a future event have been singled out and labeled "anticipatory." Such labeling suggests concerns beyond those accompanying more traditional warrants, concerns that are not adequately explained by the label. One concern is that the magistrate has no historical basis for concluding the existence of probable cause but still places a search authorization, albeit conditioned on a future event, in the hands of a government agent.

Underlying this concern is a perceived loss of judicial control over the determination that there is or is not a basis to search. With a conventional warrant, the judge has probable cause to believe that evidence of a crime has been on a specific premises: the location to be searched has been used to facilitate illegal activity or conceal evidence. Intrusion by police on the premises is at the direction of the magistrate, and later review of the warrant may result in a generous interpretation of probable cause with little sympathy for the victim of the search regardless of the results of the search. In the anticipatory warrant context, the premises to be searched may have no prior history of unlawful activity Permitting any intrusion on the premises based on a police officer's discretionary conclusion that the triggering event has occurred gives that event paramount importance in the search process and places execution of the warrant beyond the control of the neutral and detached judiciary

ensure that the item for which the warrant is issued is the item that will be seized. Where, however, police had an anticipatory warrant, the court was concerned that execution “forthwith” would precede the anticipated delivery and thereby result in a search not justified by probable cause. Premature execution is also discussed in Garcia, 882 F.2d at 699.

See Rivera, 728 F Supp. at 250 (In a civil suit asserting a fourth amendment violation, the court found that an anticipatory search warrant was valid even though the delivery was uncontrolled and no evidence was found on the premises.).

Garcia, 882 F.2d at 703 (“[W]e recognize that any warrant conditioned on what may occur in the future presents some potential for abuse.”); Segovia, 800 F.2d at 41-42 (After issuance of an anticipatory warrant, new information that affects only the timing of the search is within the discretion of the executing officers.); Hendricks, 743 F.2d at 655 (“Defendant accurately perceives the vice of prospective warrants: By issuing such a warrant, the magistrate abdicates to the DEA agents an important judicial function—the determination that probable cause exists to believe that the objects are currently in the place to be
D Federal Rules of Criminal Procedure

In addition to providing strong indications that anticipatory search warrants are not invalid per se under the fourth amendment, the Supreme Court's recent amendments to Federal Rule of Criminal Procedure 41(a) permit some forms of anticipatory warrants to be validly issued and executed. The old version of Fed. R. Crim. P. 41(a) stated that a warrant to search may be issued by a judicial officer "within the district wherein the property or person sought is located." It has been asserted that this rule required that the property sought must be in the issuing district at the time of issuance. In United States v. Goff, the court rejected that conclusion, stating that the purpose of the requirement, rather than to preclude anticipatory warrants, was to ensure that the property seized is the same as that for which the warrant was issued.

It appears that the new amendment to Fed. R. Crim. P. 41(a) is aimed at doing by rule what the district court in Goff did by searched.); Skaff, 418 F.2d at 433 ("[A] warrant which antedates the commission of the offense which is relied upon to support its issuance might lack an essential element of judicial control: the requirement that probable cause exist to believe that execution will not precede the commission of the crime or possession of the goods to be seized."); Glen, 331 N.Y.S.2d at 660, 282 N.E.2d at 617 (One issue was whether granting an officer discretion as to whether or when to execute a search warrant makes the warrant unreasonable. To reduce officer discretion, the court desired strong evidence that the delivery was likely.).

The new amendments to Fed. R. Crim. P. 41(a) were sent to Congress in May 1990 and became effective in December 1990.


681 F.2d at 1238.

Id. at 1240. In Goff a defendant suspected of transporting narcotics was on a non-stop flight from Miami to Washington State when the warrant was issued in Washington. The warrant was issued to search the defendant when he arrived; the warrant did not specify search of as yet unknown premises. Defendant could not alter his plans to arrive in Washington because he was already en route. Nevertheless, warrant execution was conditioned on the future event—defendant's arrival in Washington. Since the warrant could not be executed until the defendant's arrival, there was no danger of seizing property other than that sought in the warrant. Therefore, there was no violation of Fed. R. Crim. P 41(a). The court stated that "[w]e do not interpret Fed. R. Crim. P 41(a) to require that, in every circumstance, the evidence sought must be physically in existence within the district at the time the warrant issues." Id. (relying on Skaff, 418 F.2d at 430).

In a series of child pornography sting cases, it is not clear that the materials to be seized were, in every instance, in the issuing district at the time of issuance. See Dornhofer, 859 F.2d at 1195 (materials to be seized may have been in Washington, D.C., when the warrant was issued in Virginia); Goodwin, 854 F.2d at 33 (seized materials appear to have been in New Jersey or Washington, D.C., when the warrant was issued in Virginia); Washington, 852 F.2d at 803 (location of materials to be seized at the time of issuance of the warrant is unclear).
interpretation. The new rule replaced the old version of Fed. R. Crim. P. 41(a)\textsuperscript{38} with the following language:

Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed, and (3) by a federal magistrate for a search of property outside the United States if the property is lawfully subject to search and seizure by the United States and is relevant to a criminal investigation in the district in which the warrant is sought.\textsuperscript{39}

One purpose given by the advisory committee for the change is to encourage anticipatory warrants in appropriate circumstances\textsuperscript{40} by making clear that such warrants are permissible. The advisory committee note suggests that the new amendment permits issuance of an anticipatory warrant in a district in two newly defined circumstances. First, under the new version, an appropriate federal or state judicial officer may authorize a search within the issuing district for a person or property that it is anticipated will be within the issuing district at some time in the future. The change is accomplished by deleting a requirement in the old version that permits issuance of a warrant only in the district in which the person or property sought "is located." The warrant is anticipatory because execution is conditional upon arrival of the person or property in the issuing district.

\textsuperscript{38} The old version of Fed. R. Crim. P 41(a) stated the following:
A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.


\textsuperscript{40} The Committee Note accompanying the new amendments to Rule 41(a) begins with a statement concerning the constitutional preference for warrants:
First [the new amendment] furthers the constitutional preference for warrants by providing a mechanism whereby a warrant may be issued in a district for a person or property that is moving into or through a district or might move outside the district while the warrant is sought or executed.

\textit{Id.} at advisory committee's note.
The second circumstance occurs when property or a person is currently within the district in which the warrant is sought but the property or person may move outside the district during the warrant application process or before its execution. Once properly issued in one district, the warrant may be validly executed in another. In this situation, however, the warrant must be issued by a federal magistrate. Although labeled anticipatory in the committee note, execution of the warrant is not necessarily conditioned on movement of the seizable item from one jurisdiction to another.41

The purpose of the rule change is to recognize what the advisory committee views as the practicalities of the situation. When property is in transit, "there may be good reason to delay execution until the property comes to rest."42 By reference to "delay" of the search, the advisory committee appears to acknowledge that it contemplates situations where police could get a warrant to search a container currently located in the issuing district but for tactical reasons want the container to continue to its destination. The "good reason to delay execution" would appear to be that set out in Illinois v. Andreas:

The lawful discovery by common carriers or customs officers of contraband in transit presents law enforcement authorities with an opportunity to identify and prosecute the person or persons responsible for the movement of the contraband. To accomplish this, the police, rather than simply seizing the contraband and destroying it, make a so-called controlled delivery of the container to its consignee, allowing the container to continue its journey to the destination contemplated by the parties. The person dealing in the contraband can then be identified upon taking possession of and asserting dominion over the container.43 (footnotes omitted).

41 The changes in the rule merely eliminate some potential jurisdictional objections to anticipatory warrants. The newly approved anticipatory search warrants can be issued when there is probable cause to believe that certain property is seizable. The property may be in transit from one jurisdiction to another. Thus, the jurisdictional location and possibly the specific premises of the search are in doubt. In those circumstances, a valid anticipatory search warrant may be issued in either the jurisdiction of current location or the jurisdiction of anticipated location.

42 Fed. R. Crim. P 41(a) at advisory committee's note.

43 Illinois v. Andreas, 463 U.S. 765, 771 (1983). The property seized in Andreas was taken from the defendant outside his premises. The Court determined that re-seizure of the recently delivered container and search for the previously discovered contraband did not impinge on the defendant's legitimate expectation of privacy. The facts did not involve any
Application for a search warrant or execution of an already issued warrant for containers in transit can be delayed in order to identify the persons who eventually take possession of the container. Obtaining a warrant in the shipping jurisdiction prior to delivery to the addressee in the receiving jurisdiction permits police to avoid potential delays and loss of evidence if they have to wait until the shipment reaches the receiving jurisdiction before applying for a warrant. Where the warrant is obtained in the shipping jurisdiction, neither the validity nor execution of the warrant is conditional. Rather, police are given discretion to execute the warrant at a time more conducive to gathering evidence of unlawful possession or distribution.

For the delay tactic to be effective, officers usually must follow the container to a resting place where a search of the container and the place reveals evidence of the possessor's knowledge of the contents. Carried to its logical conclusion, the advisory committee would appear to authorize searches at locations that may not yet be known or listed in the warrant and will be determined at the executing officer's discretion.

The advisory committee, however, specifically rejected an interpretation that permitted searches of locations not disclosed in the warrant. The advisory committee stated that the proposed intrusion into the defendant's premises.

The dissent in Andreas also acknowledged the validity of controlled deliveries:

I agree entirely with the Court that "controlled delivery" is a proper and effective tool of responsible law enforcement (citations omitted). If contraband is discovered in a package passing through customs inspections, the authorities are not required to seize it then and there, but may make use of their discovery to obtain more evidence and to capture the culprits behind the contraband. The "controlled delivery" technique, however, would be just as effective, and decidedly more proper, if the second search that came at its culmination were authorized by a valid search warrant.

Id. at 780-81 (Brennan, J., dissenting).

In United States v. Singh, 811 F.2d 758, 760-61 (2d Cir. 1987), cert. denied, 483 U.S. 1021 (1987), the court permitted police to re-seize evidence without a warrant even though the evidence was inside the doorway of a warehouse. The court suggested that the search just inside the door was not a general search of the warehouse.

44 FED. R. CRIM. P 41(a) at advisory committee's note. The advisory committee note refers to United States v. Chadwick, 433 U.S. 1 (1977), as an example where a warrant might have been sought in the jurisdiction of shipment to search a container in the jurisdiction of delivery. Police had probable cause to believe that a footlocker shipped by air contained marijuana. Immediately after the footlocker was claimed and placed in the trunk of a car, the footlocker was seized and searched without a warrant. The search was invalid.

Note that the only search approved in the example given by the advisory committee
rule does not "abrogate the requirement of particularity]. The amendment would authorize the search of a particular object or container provided that law enforcement officials were otherwise in a lawful position to execute the search warrant without making an impermissible intrusion." This restriction is consistent with cases involving particularity of the place to be searched.

The restriction is not consistent with the rationale that there are valid reasons for delay. The restriction limits a search to locations where the police already have a right to be. Usually, police will be able only to identify the person who has authority to take the container from the shipper; receipt by such a person may not demonstrate knowledge of the contents or intent to possess the contents. As indicated in *Andreas*, these latter two conclusions frequently will be the most important reasons for the delay in seizure and search.

Nevertheless, the combined effect of the new amendments and the advisory committee's note concerning encouragement of warrants and delay of a search appears to approve anticipatory warrants. When containers are in transit, either within or moving beyond the issuing district, judicial review of the basis for an intrusion and identification of persons with knowledge of the container's contents are achieved by an anticipatory warrant specifying the container or location to be searched. On the other hand, the new rule may provide the government with one more forum for shopping for judges who may be more inclined to issue a search warrant.

would be a search of the container in the receiving location, not the search of a premises. In *Chadwick* police did not know the premises or jurisdiction in which the footlocker would finally come to rest. The advisory committee thus would validate the warrant as long as the container was in a place where the police had a right to be without a warrant.

Authorizing issuance of the warrant in the shipping jurisdiction and permitting a delay of execution appears disingenuous in the *Chadwick* situation. The Court in *Chadwick* permitted seizure of the container in the receiving jurisdiction on an exigent circumstances theory. The Court merely prevented a search until a warrant was obtained. Immobilization of the container while the warrant is obtained should eliminate concerns about loss of evidence or a need to get a search warrant in the shipping jurisdiction.

41 Fed. R. Crm. P 41(a) at advisory committee's note.
46 *See infra* notes 97-110 and accompanying text.
47 *See United States v. Leon*, 468 U.S. 897, 918 (1984). In adopting the good faith exception to the fourth amendment exclusionary rule, the Court, although calling the possibility speculative, at least acknowledged the possibility of magistrate shopping. "One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause deters future inadequate presentations or 'magistrate shopping'"

*Id.*
The rule does not otherwise provide guidelines for defining an anticipatory warrant or determining other circumstances in which an anticipatory warrant is appropriate. In light of concerns about expansive police discretion, the potential for magistrate shopping, and the possible effects of the good faith exception, the viability of an anticipatory search warrant in a specific circumstance should depend on its purposes and alternatives.

E. Purposes and Alternatives

Inherent in the anticipatory warrant process is a potentially broad grant of discretion to police. In situations where the triggering event is not within the control of police, the officer on the scene will determine whether there is sufficient reason to believe that the anticipated triggering event has taken place. The officer decides whether the event justifying the magistrate's probable cause determination has occurred. The potential loss of judicial control of the probable cause determination demands careful evaluation of the anticipatory warrant process.

One method of evaluating the validity of anticipatory warrants is suggested by the Supreme Court's review of other intrusions asserted to be violations of the fourth amendment. In right to privacy contexts, the Court balances governmental and societal interests versus individual interests. The balancing process includes examination of the purposes of the warrant and the availability of limitations and alternatives.

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48 In Moore, 742 F Supp. at 727, police obtained an anticipatory warrant based on a controlled delivery of drugs to the defendant's address by a police officer dressed in a U.P.S. uniform. Unable to make delivery, the container was returned to the U.P.S. office where it was picked up shortly thereafter by a person other than the addressee. Police followed the car containing the drugs but lost contact with it after a high speed chase. Police also attempted to maintain surveillance of defendant's apartment complex but discovered too many entries to determine if the container was delivered to defendant. Nevertheless, the police concluded that there was probable cause to believe that the container was delivered, and they executed the warrant. The court found the execution to be invalid but found other reasons to validate the seizure.

49 Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (utilizing a balancing approach in determining that a search warrant for third party premises was reasonable in light of purposes and alternatives such as a subpoena ducem tecum). It is also clear that most of the current exceptions to the warrant requirement involve an analysis of the scope of the intrusion versus the governmental or societal need for such an intrusion. See generally Winston v. Lee, 470 U.S. 753 (1985) (applying a balancing analysis to a state court-ordered surgical intrusion); Leon, 468 U.S. 897, 913; Gates, 462 U.S. 213; Michigan v. Summers, 452 U.S. 692 (1981); Terry v. Ohio, 392 U.S. 1 (1968).
Anticipatory search warrants serve two apparent purposes. One purpose, reflected in the discussion on the revision of Fed. R. Crim. P 41(a), is authorization of a prompt search warrant for property that is being transported from one jurisdiction to another so that evidence is not lost due to delays in obtaining warrants in the receiving jurisdiction. A second purpose is to serve as an adjunct to the approved investigatory tactic of "controlled deliveries," which includes deliveries by agents of the government or deliveries that can be observed by police. Also, anticipatory warrants have been approved to supplement investigations where uncontrolled deliveries are anticipated. Uncontrolled deliveries occur when police have a tip that a delivery will occur but they will not be able to observe or verify the delivery prior to warrant execution.

1. Controlled Deliveries

a. Purposes

In one typical controlled delivery scenario relating to unlawful possession of drugs or other contraband such as machine guns, police intercept the contraband during shipment. One obvious option for the government after interception is destruction of the contraband. Along with destruction, the shipper, if known, and the addressee may become targets of continuing investigation. Prosecution of the shipper for possession or distribution based only on interdiction of a shipment of contraband may be possible, but prosecution of the addressee is virtually impossible because there is no evidence of knowing possession. At best, the address label might be useful in a conspiracy prosecution of the addressee. Successful prosecution requires significantly more evidence, however, than merely being the addressee of the shipment. Therefore, agents may attempt to make a controlled delivery of the previously intercepted contraband to identify the person who takes possession and control.

In another frequently occurring situation, delivery of visual depictions of minors engaging in sexually explicit conduct is necessary to prove the crime of knowing receipt of pornographic

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50 See supra notes 34-47 and accompanying text.
51 See infra note 81 and accompanying text.
52 Andreas, 463 U.S. at 765; see supra note 43 and accompanying text.
materials from interstate or foreign commerce or from the mail.\textsuperscript{53}
Possession of child pornography is not an offense; the offense is knowing receipt of child pornography through the mail or interstate or foreign commerce. Therefore, defendants can be convicted only when delivery of the materials completes the offense. Interception and destruction of child pornography materials merely keeps a particular piece of material from the recipient and provides investigatory leads. Interception does nothing toward limiting the market demand for such material. Some limitation of demand can be achieved by increasing the risk of apprehension for all purchasers through the apprehension of some purchasers. Controlled delivery is one viable method of achieving that goal.\textsuperscript{54}

In both controlled delivery situations, delivery is the key to any intrusion into a private premises to identify and prosecute persons possessing contraband or receiving child pornography through the mail. Implicit in the Supreme Court's approval of controlled deliveries is the concept that a search subsequent to delivery will be necessary to confiscate the contraband and to obtain significant evidence of the recipient's involvement in the unlawful receipt, distribution, or possession of the contraband. A search based on an anticipatory warrant achieves those goals.

\textbf{b. Alternatives}

In evaluating whether a search is reasonable, the Court also considers other options available to achieve the goals contemplated by approval of the controlled delivery process. Availability of viable options, however, will not necessarily render a search unreasonable.\textsuperscript{55} Other options currently available to police include the following: (1) a post-delivery application for a search warrant,

\begin{footnotesize}
\textsuperscript{54} See Boffardi, 684 F Supp. at 1268; see also New York v. Ferber, 458 U.S. 747, 761 (1982).
\textsuperscript{55} Zurcher, 436 U.S. at 559. In accepting the reasonableness of a search warrant for the premises of a person not suspected of a crime, the Court indicated that a potentially less intrusive alternative means (a subpoena \textit{duces tecum}) of gaining the same evidence did not render the search unreasonable:

The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena \textit{duces tecum}, whether on the theory that the latter is a less intrusive alternative or otherwise.
\end{footnotesize}
either in writing or by telephone; (2) a pre-delivery affidavit setting forth the circumstances surrounding the anticipated delivery followed by a post-delivery telephone call to the magistrate verifying delivery; or, (3) an exigent circumstances entry as an exception to the warrant requirement.

The first option for police requires waiting until delivery and then applying for a conventional warrant either in writing or by telephone under Fed. R. Crim. P. 41(c)(2).\textsuperscript{56} Most courts have determined that the time necessary after delivery to get either a written or telephone warrant may be too long to avoid possible loss of the evidence since drugs are easily repackaged and distributed from the premises.\textsuperscript{57} Also, while waiting for a warrant, additional events may occur that force police to arrest or intrude without the benefit of judicial review.\textsuperscript{58} Therefore, post-delivery warrants have not been constitutionally required.

\textsuperscript{56} \textit{Fed. R. Crim. P 41(c)(2)(A)} states,

General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.\textsuperscript{59}

\textit{See Hendricks}, 743 F.2d at 655 n.2.

\textsuperscript{57} In \textit{Garcia}, 882 F.2d at 703, the court stated,

Yet, one of the major practical difficulties that confronts law enforcement officials is the time required to obtain a warrant. In many instances, the speed with which government agents are required to act, "especially when dealing with the furtive and transitory activities of persons who traffic in narcotics", demands that they proceed without a warrant or risk losing both criminal and contraband.\textsuperscript{60}

\textit{See United States v. Gallo-Roman}, 816 F.2d 76 (2d Cir. 1987) (warrantless search of defendant's apartment did not violate fourth amendment where the defendant received the package in a controlled delivery, discovered that it had been tampered with, and could have easily destroyed the evidence in the time it would have taken the police to obtain a warrant).

In \textit{dicta in Flippen}, 674 F Supp. at 539, the court distinguished between the exigencies involved in anticipatory warrants for drugs and for child pornography, stating that

The characteristics of drugs and child pornography differ greatly. Upon delivery drugs are used up or immediately distributed. If government officials are not permitted to seize the drug deliveries immediately, the evidence may disappear during the time spent securing a search warrant. On the contrary, child pornography is not used up or distributed upon delivery.\textsuperscript{61}

\textsuperscript{58} In \textit{Andreas}, 463 U.S. at 765, police observed delivery of a known shipment of contraband to the defendant's premises. Defendant left the premises with the recently delivered container 45 minutes after delivery. The police sought a warrant but it was not issued when defendant emerged from his premises. The officer on the scene arrested the defendant and searched the package. The only basis for the arrest was possession of the drugs that the officer believed were still in the container. The Court validated the arrest and seizure because there was a substantial likelihood that the container still held the contraband and that defendant had no expectation of privacy in a container that has been intercepted and found to contain drugs.
The second possibility is presentation of an affidavit to the magistrate prior to delivery giving the magistrate all of the probable cause information. As with an anticipatory warrant, the magistrate’s approval of a search is conditional on delivery. However, the issuing court can require that prior to execution of the warrant the officer telephone the magistrate and describe the events leading to the officer’s conclusion that the conditions have been fulfilled. Only then would the magistrate make a final determination that probable cause to search exists. Potential time loss in trying to reach the magistrate by telephone and consequent loss of evidence appear to be the primary arguments against requiring this process as the minimal method of satisfying the fourth amendment.

Absent some type of warrant or preliminary approval, a third option after delivery is a search based on exigent circumstances. One court appears to approve exigent circumstances entry in some situations, even when there is a controlled delivery of narcotics. Other courts take a more restrictive view and hold that exigent circumstances do not exist when the police create the alleged exigency. In a controlled delivery, police already possess the contraband, which they deliver to the defendant and thus deliberately create the so-called exigency. Permitting the manufacturing of an exigency so that police can conduct a search and seizure in a residence or business without a warrant would allow the exception to consume one of the last remnants of the fourth amendment warrant requirement.

59 In Gallo-Roman, 816 F.2d at 76, the court found that a pre-search draft was too burdensome and that requiring a telephone warrant after delivery presented potentially insurmountable timing problems. The court specified that 20 minutes between delivery and search was insufficient to reach a magistrate, explain the circumstances, and allow time for a reasoned decision by the magistrate. But see Hendricks, 743 F.2d at 655 n.2 (after finding an anticipatory warrant invalid, the court suggested that telephone warrants were preferred); Gutman, 670 P.2d at 1173 n.5 (urging magistrates to require police to get a preliminary warrant conditioned on a future event that must be called in to the magistrate for final approval of the search); Commonwealth v. Douglas, 503 N.E.2d 28, 31 (Mass. 1987) (The court suggested that the state has the burden of demonstrating that “time pressures made it impractical to include in the warrant the precise place to be searched. There may well have been time to submit to a magistrate, by supplemental affidavit, the location of the place to be searched, once Trooper Sullivan informed other law enforcement personnel of the location.”).

60 See Gallo-Roman, 816 F.2d at 76; Singh, 811 F.2d at 758; see also United States v. Panitz, 907 F.2d 1267 (1st Cir. 1990) (search of a vehicle after a controlled delivery of the vehicle as a container of narcotics was valid under the automobile exception although exigent circumstances also warranted the search).

61 See infra note 102 and accompanying text.
There appears to be even less reason to permit an exigent circumstance exception for controlled deliveries of child pornography. As indicated in United States v. Flippen, the exigencies surrounding drug trafficking do not apply to child pornography because, unlike many drugs, the pornographic material is kept for personal use. Therefore, the material is unlikely to be removed from the premises.

Another search option not often factually available occurred in Illinois v. Andreas. The Court stated that once drugs are intercepted they remain in the constructive possession of the police even when placed back in the normal stream of commerce for delivery purposes. The major difficulty with that concept is that once the container is taken into a business or private premises, constructive possession should not validate a warrantless intrusion to recover the contraband. Therefore, where evidence of a defendant’s acceptance, possession, and control is the goal, constructive possession should provide little assistance. Nevertheless, in United States v. Singh, the court opened the door, so to speak, by permitting a warrantless intrusion into an area just inside a warehouse door to recover the constructively possessed property. The court asserted that constructive possession would not justify any broader intrusion into the premises.

In the context of the above alternatives, the anticipatory search warrant, at a minimum, better serves two purposes: it protects privacy rights by providing for judicial scrutiny of potential probable cause prior to entry by police; and it permits prompt entry

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62 674 F. Supp. at 536. Although the Fourth Circuit issued no opinion in Flippen, it previously accepted the validity of anticipatory warrants in a child pornography case. See Dornhofer, 859 F.2d at 1195.

63 Flippen, 674 F. Supp. at 539.

64 463 U.S. at 765.

65 811 F.2d at 758.

66 The dissent claimed that a full search of the warehouse occurred. Id. at 763-67 (Kearse, J., dissenting). It is unlikely that the Singh rationale will be applied beyond its facts.

67 The court in Garcia, 882 F.2d at 703, stated as follows:

Courts—though not yet the Supreme Court, to be sure—have upheld the anticipatory warrant, in large part because they see it as desirable, whenever possible, for police to obtain judicial approval before searching private premises. Indeed, the fourth amendment mandates that, with few exceptions, a warrant be obtained before any search of a dwelling occurs.

Based on these considerations, we believe that the purposes of the fourth amendment are best served by permitting government agents to obtain warrants
to enhance the evidentiary value of the seizure while also increasing the potential for recovery of the recently delivered contraband. Prompt seizures without the potential time lost in seeking a post-delivery search warrant may be vital to successful prosecutions.

Frequently, however, the anticipatory search warrant also authorizes a search for and a seizure of additional evidence related to the suspected offense. While apprehension of persons unlawfully receiving or possessing child pornography or contraband is certainly a justifiable goal, individual privacy rights should not suffer as the means to the legitimate end. In the context of a search after a controlled delivery, close scrutiny should be given to the scope of the search so that the warrant does not become a general authorization to rummage through the recipient’s possessions in a search for anything of interest to the government.68

2. Uncontrolled Deliveries

Many potential deliveries of contraband about which police have information will be uncontrolled. Concerns about timeliness of the search and confiscation of contraband discussed under con-

In advance if they can show probable cause to believe that the contraband will be located on the premises at the time that search takes place. We therefore explicitly hold today what we assumed in Segovia [800 F.2d 39 (2d Cir. 1986)]: Anticipatory warrants are not unconstitutional per se, and in the proper circumstances, may be an effective tool, both to fight criminal activity, and to protect individual fourth amendment rights.

In Alvildres, 90 Cal. Rptr. 682, 685-86, the same concepts were utilized:
The entire thrust of the exclusionary rule and the cases which have applied it is to encourage the use of search warrants by law enforcement officials.

We must ask ourselves whether the objective of the rule is better served by permitting officers under circumstances similar to the case at bar to obtain a warrant in advance of delivery of the narcotic or by forcing them to go to the scene without a warrant and there make a decision at the risk of being second-guessed by the judiciary if they are successful in recovering evidence or contraband. We believe that achievement of the goals which our high court had in mind in adopting the exclusionary evidence rule is best attained by permitting officers to seek warrants in advance when they can clearly demonstrate that their right to search will exist within a reasonable time in the future. Nowhere in either the federal or state constitutions, nor in the Statutes of California, is there any language which would appear to prohibit the issuance of a warrant to search at a future time.

Garcia, 882 F.2d at 703, and W LaFAVE, supra note 8, § 3.7(c), at 96 cite the foregoing language with approval. See Revere, 563 A.2d at 1256 (anticipatory warrants provide police with flexibility in responding to crime while ensuring oversight by a neutral judiciary).

68 See infra notes 110-24 and accompanying text.
trolled deliveries are applicable to uncontrolled deliveries, with one additional problem. When the delivery is uncontrolled, police may have no more information concerning the premises to be searched after the anticipated delivery time than they had before. Probable cause to search will depend on the credibility of the informant providing the information that a drug delivery is to occur. Consequently, a search warrant application after the anticipated delivery time would present no greater probable cause information to a magistrate than a pre-delivery application. It is irrelevant for probable cause purposes whether the warrant is issued before or after the anticipated delivery. Further, there would be no benefit to the government or to the individual to delay the warrant application or require a telephone call that provides no new information after the anticipated delivery time.

Also, the exigent circumstances exception has a somewhat different application where the drug delivery is uncontrolled. Police do not create the exigency that might justify entry into a premises. Nevertheless, when the circumstances creating probable cause are anticipated in advance, treating such situations as exigent circumstances runs counter to accepted definitions of exigency, which imply the sudden occurrence of unforeseen events. Even if the meaning of exigency is expanded to include anticipated but uncontrolled deliveries, the exigent circumstances should relate only to the delivery of the seizable item and should not justify any search beyond retrieval of the delivered material.

Further, when the magistrate relies on informant credibility to determine the likelihood that the item will be on a premises, conditions other than the passage of time can not be usefully imposed because police are unaware of the circumstances of delivery. Denial of a search warrant until predictions are verified may cause delay resulting in a loss of evidence or a change in circum-

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69 The Supreme Court has approved a totality of the circumstances analysis of probable cause based on an informer's information. See Gates, 462 U.S. at 213. In Rivera, 728 F. Supp. at 257 (citing Garcia, 882 F.2d at 699), the court stated that "Garcia requires that an affidavit supporting an anticipatory warrant show that the agent believes there will be a delivery, why he believes it, and how reliable are his sources of information." See also Rivera, 563 A.2d at 1256 ("A statement by one who intends to participate in the crime that is the object of the search warrant ordinarily provides a sufficiently reliable basis for concluding that criminal activity will take place where and when he says it will.").

stances that gives rise to an exigency. For instance, assume in *Illinois v. Gates* that police observed the defendants, just prior to reaching their home, drive their vehicle into a warehouse or other location where drugs could be surreptitiously removed. Police would then have multiple options. One possibility would be an exigent circumstance entry to make an arrest. *Draper* would support probable cause for arrest, and entry could be based on a variant of *Dorman v. United States* or the hot pursuit cases such as *Warden v. Hayden*. At a minimum, the police would be able to seize the automobile while a warrant was sought. Possibly, the automobile exception would permit immediate search of the automobile. Under the current Supreme Court balancing analysis where drug interdiction has become extremely important, it is doubtful that the Court would impose rigorous limits on the government's ability to respond to a potential loss of a drug shipment. In the hypothetical, it would be preferable that the agents have at least an anticipatory warrant that discloses to the magistrate all available information and sets forth conditions that must be met or information that must be verified before police search the defendants' property. Variation from the conditions of the warrant could require close scrutiny to determine whether police execution of the warrant exceeded their limited discretion.

If the goals of controlled deliveries posited earlier are valid societal and governmental interests, then short of requiring police to take a chance on losing the evidence through post-delivery warrant application or expanding the exigent circumstance exception to include controlled deliveries, the anticipatory warrant may involve the neutral and detached judiciary to the maximum extent without also risking loss of evidence. As with any application, the anticipatory search warrant affidavit serves as a pre-search listing of available historical facts that police believe are important to the

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71 462 U.S. at 213.
73 387 U.S. 294 (1967).
75 See *Segovia*, 800 F.2d at 39 (The anticipated delivery was unexpectedly made piecemeal. A decision to delay execution beyond the time limit specified in the warrant did not invalidate the search because police acted reasonably under the circumstances and the new circumstances did not affect probable cause to believe drugs were on the premises to be searched.); *Moore*, 742 F. Supp. at 727 (failure to maintain observation of a "controlled delivery" invalidated the anticipatory element of the warrant).
probable cause determination. In addition, when compared to after-the-fact assertions of exigent circumstances, the affidavit disclosures prevent potential confusion as to what information was available to police prior to entry into the premises. Finally, the affidavit provides an opportunity for the magistrate to determine in advance the proper scope of the search.

Additionally, in issuing an anticipatory warrant the magistrate can list all predicate events necessary to complete probable cause and trigger an intrusion into the listed premises. Such a warrant achieves the goals of a controlled delivery while offering the magistrate some control over the discretion of the police officer who determines that the conditions of the warrant have been met. Any deviation from the listed conditions should trigger detailed review of the officer’s decision to search.

III. REQUIREMENTS OF A VALID ANTICIPATORY WARRANT

Evaluation of anticipatory warrants must include review of the judicially imposed warrant requirements in each of the potential fact patterns in which such warrants are sought. The requirements should reflect both the requirements of conventional search warrants and the purposes of the warrant clause as reflected in the balancing process likely to be used by the Court. Careful attention should be paid to the following issues: (A) the basis for probable cause to believe that the item specified is seizable by police; (B) the degree of probable cause or certainty that the seizable item will be delivered to a specified location;\(^7\) (C) the specificity of premises.

\(^7\) People v. Glen, 331 N.Y.S.2d 656, 661, 282 N.E.2d 614, 617 (1972) stated the following:

The remaining question then is whether a prospective warrant, by not being sufficiently limited, may allow an unreasonable search, particularly because it involves some discretion in the executing officer whether and when to execute it. Of course, even when there is present possession of the seizable property the officer has minimal discretion not to execute the warrant if it should appear to him, from whatever source, that the possession is no longer the fact at the time of expected execution. At best, present possession is only probative of the likelihood of future possession. In cases like these [anticipatory warrants] the certainty of future possession is greater or is often greater than that based on information of the past and presumably current possession.

The ultimate answer to the problem is that as long as the evidence creates substantial probability that the seizable property will be on the premises when searched, the warrant should be sustained. To be sure, where there is no present possession the supporting evidence for the prospective warrant must
to be searched; and (D) the appropriate scope of a search conducted pursuant to an anticipatory warrant.

A. Seizable Item

The issuing court first should examine the degree of certainty that a seizable item is involved at all. In many situations customs officials have intercepted a shipment that contains drugs that are unlawful to possess or child pornography that is unlawful to receive in the mails. In those situations, it is generally certain that the item sought may be validly seized. In other situations police may rely on an informant for probable cause that one is to receive a shipment of drugs on a specified date. This latter situation raises two problems—reliability of the informant and degree of certainty that delivery will occur.

B. Delivery

Since two primary purposes of delivery of contraband for which anticipatory warrants may be issued are identification of persons assuming control of the contraband and completion of a crime, the likelihood of delivery is a key ingredient in both the probable cause determination and the execution of the warrant. Likelihood of delivery has two facets—form of delivery of the item and acceptance by the addressee or someone else.

1. Form of Delivery

The first concern is the degree of certainty that the contingent future event (delivery) will take place. There are three general delivery variations that can occur, each with a different impact on certainty of delivery and, presumably, on probable cause and the decision to execute the warrant.

be strong that the particular possession of particular property will occur and that the elements to bring about that possession are in process and will result in the possession at the time and place specified. (emphasis added).

77 See, e.g., United States v. Peden, 891 F.2d 514 (5th Cir. 1989).
80 In Rivera, 728 F Supp. at 250, it appears that the anticipated shipment did not occur. Further, the police discovered no other evidence of criminal activity when they searched. The court found that the police were not civilly liable because the affidavit presented sufficient information disclosing why the officer believed the delivery would occur and disclosing the reliability of his sources.
a. Controlled Delivery

Police may use a controlled delivery in which an undercover police officer poses as a postal delivery person or as an employee of a private carrier and personally transfers the contraband to someone at the suspected address.\(^8\) This procedure leaves no doubt that delivery will occur for probable cause purposes or has occurred for execution purposes. It provides the highest degree of probable cause that the contraband will arrive on the suspect premises or into the hands of the suspect individual, and limits police discretion over the decision to execute since the government agents can not be mistaken about whether delivery to the appropriate location has occurred.

b. Observed Delivery

In a second category of cases, police are able only to observe material portions of a delivery. This form of delivery also often is referred to as a "controlled delivery."\(^8^2\) The most common example is where a container of contraband or pornographic materials has been intercepted in the mail. The container is put back into the mail or placed with a common carrier, and delivery by a non-governmental employee to the defendant is observed.\(^8^3\)

Another example of an observed delivery is where an informant is to deliver the suspect package to a specific address. Police may be certain that the informant is carrying a package containing contraband into a particular premises and then may observe the informant leave the premises without the package.\(^8^4\)

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\(^8^2\) See, e.g., United States v. Washington, 852 F.2d 803 (4th Cir. 1988) (observed mail delivery); United States v. Hale, 784 F.2d 1465 (9th Cir. 1986) (observed mail delivery).

\(^8^3\) See, e.g., Peden, 891 F.2d at 514 (observed mail delivery of child pornography); United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988) (police observed mail delivery of child pornography and observed defendant take the material into his premises); United States v. Goodwin, 854 F.2d 33 (4th Cir. 1988) (observed mail delivery); United States v. Singh, 811 F.2d 758 (2d Cir. 1987) (shipment of contraband was intercepted by customs and delivery by a common carrier was observed by agents); Hale, 784 F.2d at 1465 (observed mail delivery).

\(^8^4\) Cf. United States v. Garcia, 882 F.2d 699 (2d Cir. 1989) (Two drug couriers were intercepted at customs and then sent to make an observed delivery. The two couriers entered
Still another fairly common example is where the addressee picks up the container at the post office or at a common carrier and is then followed to a final destination. Police may or may not be able to observe the container enter the premises.\(^8\)

The foregoing situations provide police with varying degrees of certainty of deliveries to specific locations. Absolute certainty does not appear to be required. In *Illinois v Andreas*, in a different context, the Court stated that perfect controlled deliveries of drugs are virtually impossible and absolute certainty of delivery unattainable.\(^8\)

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\(^8\) See, e.g., *United States v. Gallo-Roman*, 816 F.2d 76 (2d Cir. 1987) (A package containing drugs was intercepted and then sent on to the addressee's post office box. Defendant was observed picking up the package and was followed to his premises. The court approved an exigent circumstance entry to recover the contraband.); *United States v. Zygarowski*, 724 F Supp. 1052 (D. Mass. 1989) (defendant observed picking up child pornography at the post office and followed to his premises).

\(^8\) *Andreas*, 463 U.S. at 765. The case involved a delivery to the defendant, who accepted the package outside his apartment. Police observed the defendant drag the container into his apartment. The container was out of police observation for 30 to 45 minutes. The defendant then emerged from the apartment carrying the recently delivered container. In discussing defendant's expectation of privacy in the container on re-emergence the Court stated,

However, the rigors and contingencies inescapable in an investigation into illicit drug traffic often make "perfect" controlled deliveries and the "absolute certainty" demanded by the Illinois court impossible to attain. Conducting such a surveillance undetected is likely to render it virtually impossible for police so perfectly to time their movements as to avoid detection and also be able to arrest the owner and reseize the container the instant he takes possession. Not infrequently, police may lose sight of the container they are trailing, as is the risk in the pursuit of a car or vessel.

During such a gap in surveillance, it is possible that the container will be put to other uses—for example, the contraband may be removed or other items placed inside. The likelihood that this will happen depends on all the facts and circumstances, including the nature and uses of the container, the length of the break in surveillance, and the setting in which the events occur. However, the mere fact that the police may be less than 100% certain of the contents of the container is insufficient to create a protected interest in the privacy of the container.

A workable, objective standard that limits the risk of intrusion on legitimate privacy interests is whether there is a substantial likelihood that the contents of the container have been changed during the gap in surveillance. We hold that absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a
c. Uncontrolled Delivery

A third delivery possibility is an uncontrolled delivery. Police may be aware only that a delivery of contraband is to occur at a particular time and place but be unaware of the person who is to make the delivery. In that context, police may have to rely on observations consistent with delivery by someone or solely on the information provided by the informant.

In United States v. Segovia, police had information concerning the time of a drug delivery to a specific address. Police observed an individual enter the premises at the appropriate time carrying a shoulder bag. That same individual left the premises within five minutes without the shoulder bag. Although police shortly verified a delivery through an informer, neither the validity of the warrant nor its execution was premised on verification. Indeed, the affidavit in support of the warrant stated that the informer would not be able to re-enter the premises to confirm the delivery.

In both observed delivery and uncontrolled delivery contexts, varying degrees of certainty of delivery exist and varying degrees of police discretion are exercised in deciding whether to execute a warrant that is conditioned on delivery. Several cases, however, suggest that the item to be seized must be "on a sure course to its destination, as in the mail." Other cases refer only to a likelihood of delivery as the appropriate standard for issuance of the anticipatory warrant. United States v. Garcia states, "Nor container previously opened under lawful authority.

Id. at 772-73.


8 Segovia, 800 F.2d at 39 (police observed a person carrying a shoulder bag enter premises and leave approximately five minutes later without the bag).

9 Rivera, 728 F. Supp. at 250 (based on an informer's statements that a delivery would be made, police obtained and executed the warrant without any corroboration of delivery); McGriff, 678 F. Supp. at 1010.

90 800 F.2d at 39.

91 See Hale, 784 F.2d at 1468 (delivery of pornographic material); Goodwin, 854 F.2d at 36 (delivery of pornographic material); Dornhofer, 859 F.2d at 1198 (delivery of pornographic material); Washington, 852 F.2d at 804 (mail delivery of drugs); United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984) (invalidating search of defendant's premises because container, although addressed to the premises, was not on sure course to the premises); see also United States v. Goff, 681 F.2d 1238, 1240 (9th Cir. 1982) (person to be searched was on a non-stop flight into the jurisdiction of warrant issuance).

92 See Garcia, 882 F.2d at 702 ("[W]hen a government official presents independent evidence indicating that delivery of contraband will, or is likely to, occur, and when the magistrate conditions the warrant on that delivery, there is sufficient probable cause to
should it be otherwise, for even a warrant based on a known presence of contraband at the premises rests also on the expectation that the contraband will remain there until the warrant is executed."

Most of the cases requiring that the item be on a "sure course of delivery" are child pornography cases, where the item has been intercepted in the U.S. mails or by a private shipper. The demand that the materials be on a sure course of delivery is easy to impose under those circumstances because the government can comply readily. Also, since acceptance of the delivery will constitute the offense, certainty of delivery offers greater protection for persons and premises for which there is no current probable cause of criminal violations. The primary purpose of this requirement appears to be maintenance of judicial control over the execution of the warrant. Note that once the warranty is issued, the likelihood of delivery becomes irrelevant because execution is dependent on actual delivery, as objectively determined by the executing officer, not on the likelihood of delivery.

In drug cases, courts appear to adopt the more traditional probable cause standard. Likelihood of delivery is merely one factor to consider. In many situations involving informers and uncontrolled deliveries, the government simply cannot comply with the "sure course of delivery" standard. Imposing the stricter standard would limit the number of situations in which anticipatory warrants might be sought. Limiting the potential for anticipatory warrants in drug delivery situations may result in police attempts to rely on the exigent circumstance exception to the fourth amendment to justify a post-delivery intrusion, further reducing judicial control over intrusions on privacy interests.

uphold the warrant.

*) (emphasis added); United States v. Lowe, 575 F.2d 1193, 1194 (6th Cir. 1978) (magistrate needs only probable cause to believe that contraband will be on the premises when the warrant is executed); Rivera, 728 F Supp. at 257 (although delivery was uncontrolled and unobserved, the magistrate had a substantial basis to conclude that there would be evidence of drug trade on the listed premises); Zygarowski, 724 F Supp. at 1059 (upholding warrant where there was a "very strong likelihood that defendant would return home with a package"); see also McGriff, 678 F Supp. at 1010.

9 882 F.2d at 702 (citing W LaFave, supra note 8, at 701).

91 See Gallo-Roman, 816 F.2d at 76 (approving an exigent circumstance entry after a controlled delivery); Roundtree, 694 F Supp. at 1230 (holding that a controlled delivery was not a basis for an exigent circumstance entry). See generally Singh, 811 F.2d at 758 (suggesting that exigent circumstances may justify re-seizing a controlled delivery). For a discussion of exigent circumstances as an alternative to an anticipatory warrant, see supra notes 59-63 and accompanying text.
Few cases discuss the proper standard for evaluating the officer's decision that a delivery, observed or uncontrolled, has taken place. Where the delivery is uncontrolled, police generally rely on an informer's information that a delivery is going to take place. It may be impossible to verify the delivery or observe events consistent with delivery. Nevertheless, as with conventional warrants, the anticipatory warrant execution is valid based on the totality of the circumstances. When there is an observed delivery, exercise of the officer's discretion will have to be objectively reasonable under all the circumstances.

2. Acceptance of the Package

Another aspect of delivery that has an impact primarily on successful prosecution, rather than on execution of the warrant, is the degree of certainty that a seizable item has been accepted by the addressee. With controlled delivery, and with many observed deliveries, police have already seized the contraband once. Since confiscation has already been achieved, the obvious purpose of delivery is to identify persons involved in criminal activity and then to recover the contraband once again. If police attempt a controlled delivery or are observing a delivery and the container is refused, then there is no basis to enter the addressee's premises.

In cases of knowing receipt of child pornography through the mails, acceptance by the addressee may be necessary to the criminal charge. For example, a spouse or other family member accepting a package addressed to another member of the family may not provide the evidence needed to prove knowing receipt by the ad-

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97 See Rivera, 728 F Supp. at 250 (requiring only that affidavit show that agent believed there would be a delivery, why he believed it, and how reliable his sources are).
96 See Segovia, 800 F.2d at 39. In Segovia, when the delivery did not occur in the quantity anticipated, the officers delayed execution of the warrant while waiting for an additional delivery. The court stated,

Their delay in light of the new information about the second kilogram was a reasonable interpretation of the limitation to execute the warrant within one hour of the arrival of the narcotics, since the full anticipated delivery had not yet occurred.

Here, the reported delivery of a second kilogram of cocaine did not implicate the magistrate's finding of probable cause, but affected only the limitation to execute the warrant within one hour of the arrival of the narcotics.

Id. at 42; see also State v. Gutman, 670 P.2d 1166, 1172 (Alaska Ct. App. 1983) (The warrant should set forth "specific, objective criteria that are sufficient to assure that officers will not execute the warrant prematurely.").
dressee from the mail of the specific item of child pornography. Regardless of who accepts the delivery, the search is valid to recover the delivered material and, depending on the scope of the warrant, possibly to obtain other circumstantial evidence of knowing receipt of child pornography.

For offenses that require only possession with knowledge of the contents, delivery to a specific address is used as circumstantial evidence of the addressee's knowing involvement in the offense. In United States v Garcia,97 delivery of contraband to the premises was the triggering event for the search. Acceptance by a particular person on the premises was not required. When police entered the premises, the contraband was still in the delivery container and the defendant was in another room. Nevertheless, the delivery, defendant's presence, and other evidence was sufficient to convict defendant on various drug conspiracy, importation, and distribution charges.

C. Specificity of Premises

The fourth amendment requires that a warrant particularly describe the place to be searched. For most anticipatory warrants the government will know the ultimate destination of the contraband. In some situations, however, the contraband container may be addressed to a business or the shipment is to be picked up by the consignee at the carrier's place of business. In either situation, police may want to follow the shipment to its final resting place in order to identify the person who takes control. Police may not be able to give the magistrate the ultimate destination of the package at the time the warrant is sought but may want to search a premises promptly when they believe that the shipment has reached its final destination.

Assuming the validity of controlled deliveries as an investigative tool and the need for quick action when the contraband reaches its final destination, police generally have three options when they do not know the ultimate location of the contraband. One option is to obtain an anticipatory warrant authorizing search of the "ultimate location" as determined by police. An alternative is a telephone warrant after the shipment reaches a final destination. As was discussed earlier, telephone warrants may not provide for a sufficiently timely search. If neither an anticipatory warrant nor

97 882 F.2d at 699.
a telephone warrant is viable, police generally are forced to rely on the exigent circumstances exception. If all three fail, then the controlled delivery serves no purpose. Further, denial of an anticipatory search warrant may provide drug dealers with a fairly easy method of evading controlled or observed delivery traps by arranging for all containers to be picked up by persons unaware of the contents of the containers.

Several courts have addressed searches after delivery to a previously unknown location. In *United States v. Singh*, customs officials intercepted a twenty-foot shipping container whose contents included hashish. The container was addressed to the defendant's business address. Police had no basis to arrest anyone until delivery of the container allowed identification of the person taking possession and control of the container. The shipment was placed in normal delivery channels and police observed delivery to the defendant's storeroom. The defendant and others began unloading the container, placing some of the contents inside the storeroom. When the container was approximately eighty-five percent unloaded, agents, without a warrant, seized the contraband inside the storeroom.

The court noted first that no warrant was needed to re-seize evidence that had already been validly seized; the item remained in the constructive possession of the police. To justify entry into the storeroom to make the re-seizure the court analogized to exigent circumstance seizures:

We are not confronted here with an unlimited search of appellant's storeroom, but with the retaking of contraband located just inside the open storeroom doors, under direct government surveillance and constructively in the government's possession. In view of the minimal nature of the government agents' intrusion and the need for continued surveillance, or an effective substitute therefor, if the controlled delivery of narcotics was to be effective, a reasonable argument might have been made that, under the peculiar facts of this case, there was an "'urgent need' that 'justif[ied]' a warrantless entry "

The dissent asserted that the police had no basis for the seizure on the defendant's premises. The exigent circumstances, if any,
were created by police returning the hashish to the normal stream of commerce for delivery to defendant. Further, the police could not claim a plain view observation as a basis for their seizure because they were not validly on the premises when the observation was made. Essentially, the agents did not seek an anticipatory warrant, possibly because they did not know where the container was going to come to rest. Nevertheless, the court wanted to allow the government to use controlled or observed deliveries to identify participants in drug distribution schemes. Therefore, to validate the search, the court had to stretch some existing exceptions to the warrant requirement.

Two state courts have reached opposing conclusions on the failure to list a specific location in a search warrant. In Commonwealth v Douglas, an undercover agent learned of a weekly illegal floating poker game where drugs and large quantities of money changed hands. The games were played early Saturday morning, and the location of the game was chosen each Friday night at a bar just before closing time. The agent obtained an anticipatory warrant to be executed at the as yet unknown place of the poker game. The agent was wired for sound and was to be a participant in the game. Through the wire the agent would lead other agents to the location to be searched. The court found that the failure to specify the location was fatal to the search. The delegation of authority to the police was considered too broad to satisfy constitutional demands that the magistrate determine probable cause to search a specific location. Thus, the warrant was an invalid general warrant.

Alaska, on the other hand, validated a warrant that permitted the police to follow defendant to an unknown destination and execute a warrant to search. The court ruled that the warrant was not a general warrant because it authorized the search of only one place—the place of concealment of a known container of narcotics. Thus, if the police can follow the container to its...

102 Generally, police cannot justify a search based on exigencies they create. United States v. Hultgren, 713 F.2d 79, 86 (5th Cir. 1983); United States v. Thompson, 700 F.2d 944, 950 (5th Cir. 1983); see Roundtree, 694 F Supp. at 1238 (controlled delivery by couriers to a known address does not by itself justify an exigent circumstance entry into the premises).
105 Id. at 862. The Morris rationale is cited with approval in W LAFAVE, supra note 8, § 3.7(c), at 100.
destination, then they can enter and search for the container. Although approving the search, both the majority opinion and a concurring justice stated that police should have as little discretion as possible in determining probable cause.106

The concern about officer discretion helps explain those cases which demand that the warrant be based on a delivery that is on a sure course to its destination.107 In United States v. Hendricks108 customs agents searched a box shipped from Brazil to the defendant at his home. The box contained cocaine. The defendant ran a business named Brazilian Imports, and his business address had been the delivery place of a previously intercepted card that contained cocaine. Agents obtained a search warrant for the defendant's residence that was conditional on the box being brought to the residence.109 The box was shipped in a manner making pick-up at the airport the only means of delivery. After pick-up, defendant was followed to his home and a search conducted.

On appellate review of the seizure, the court invalidated the warrant, finding no link between the listed premises and the illegal activity. Since the box was to be picked up, the address on it was merely for identification purposes. Once picked up, the box could go anywhere. Thus, there was no basis to believe the box was on a sure course to defendant's home.

The Hendricks warrant listed a specific location but was deemed invalid because there was no probable cause to believe that the contraband would ever be there. The container could have been taken to other premises and the contraband removed before the container reached, if it ever did, the listed location. At that point, even an observed delivery of the container would no longer provide probable cause to believe contraband was at the specified location. Treating such a delivery to the listed premises as triggering probable cause to search affords agents discretion beyond that associated with valid anticipatory search warrants.

In evaluating the importance of the specificity of location requirement for a search warrant, the validity of warrants that seek evidence that might be concealed at more than one location should

106 Morris, 668 P.2d at 862-63 n.1 (Singleton, J., concurring).
107 See supra notes 91-94 and accompanying text.
108 743 F.2d at 653.
109 The warrant application mistakenly stated that the box was already at the defendant's home when it was still at the airport. This misstatement was not a factor in the court's conclusion since the execution of the warrant was specifically conditioned on arrival of the box at the defendant's home.
be considered. Most jurisdictions approve such warrants. If the particularity requirement demands only that the government list multiple locations, then much discretion is given to the officers to execute a very broad search. Agents are likely to execute the warrant at all listed premises simultaneously in order to prevent a defendant or a cohort from learning of one search and going to other locations to destroy evidence. Thus, lack of specificity of location should not be dispositive in situations where police are validly observing delivery of a known shipment of contraband.

A warrant permitting a search of an as yet unknown terminus of a drug shipment would appear to offer less opportunity for police to intrude on privacy than does a multiple location warrant. Nevertheless, there is a valid concern as noted in State v. Morris that a container may stop in many locations before reaching a “final” destination. Without some specificity of location in the warrant, the officer has discretion to decide which of the potentially multiple stops is the one that the officer believes is the most productive to search. Concern about police discretion can be somewhat alleviated by providing specific guidelines identifying attributes of one location that justify a search, or by requiring officers to demonstrate the objective reasonableness of their choices.

D. Scope of the Search

As indicated earlier, an anticipatory search warrant based on a future event such as delivery of contraband is not invalid per se. Most of the cases approving anticipatory search warrants also approve clauses authorizing searches that extend beyond mere recovery of the recently delivered contraband. In addition to the initial question of issuance of a properly limited warrant, reviewing courts should be sensitive to the warrant’s execution so that the warrant is not merely a subterfuge for officers to enter premises

110 In United States v. Scott, 555 F.2d 522, 527 (5th Cir. 1977), the court approved a warrant to search for evidence of gambling at defendants’ “headquarter residences and vehicles.” It was probable that the items would be at one or more of those locations. Police had no specific information as to the precise location of the evidence. The court, however, permitted the normal inferences that the type of evidence sought would normally be located in the various locations. See also State v. Ernst, 264 N.W.2d 677 (Neb. 1978) (search warrant listing three locations held valid due to transience of the defendant). W LAFAVE, supra note 8, at § 4.5(c), contains a listing of multi-location search cases.

111 668 P.2d at 862, 863 n.1, 865 (expressing concern in the majority, concurring, and dissenting opinions).

112 See supra note 19 and accompanying text.
for a protective sweep or to get into position to make a plain view observation and seizure. In evaluating the appropriate scope of warrants, affidavits in support of such warrants should demonstrate probable cause to believe additional evidence is on the premises and should specify the nature of that additional evidence.

When police seek an anticipatory warrant, there will be varying quantities of information concerning the person or place involved, ranging from probable cause concerning the criminal activity independent of the future delivery, to only suspicion about the person or place, to no information at all. Obviously, in addition to the delivery, the authorized scope of the search generally will be tied to the quantity of information available concerning illegal activity on the premises or related to the delivery.

In two slightly different fact situations, the quantum of information already available to police, or when used in conjunction with defendant's name as addressee of a known shipment of contraband, may be sufficient to support a search warrant without reliance on actual delivery. For example, police may have probable cause to believe that an individual is distributing narcotics and that evidence of that crime is currently in the individual's residence. Police also may reasonably believe that an immediate search will not produce evidence strong enough to result in a conviction for narcotic distribution. Therefore, police may wait for a more propitious time to attempt to seize evidence against the defendant.

Discovery of the defendant's name on a confirmed shipment of drugs provides the timing tool that will make a search most effective. Police will now seek a warrant to search for the item to be delivered as well as other evidence of the offense. Based on the additional information known about the defendant, a search beyond mere retrieval of the delivered shipment may be justified.\footnote{See Washington, 852 F.2d at 805. The court found that a warrant was sufficiently specific for a broad search when based on an affidavit that stated the following: Based on the probable cause developed in this investigation, it is the belief of your affiant that there is currently secreted inside the premises of 3016 Sunset Lane, Suitland, Maryland, a quantity of drug paraphernalia, papers, notes, bank records, identification documents and other items of evidence that will identify the person using the name Ms. Ajoke Olushola and others involved in this conspiracy to import and distribute heroin. \textit{Id.} at 805. In Rivera, 728 F Supp. at 257, the court approved a broad search warrant that did not result in any seizure. The court stated, Using a totality-of-the-circumstances analysis the magistrate had a "substantial basis" to conclude that evidence of drug trade would be found in plaintiffs' apartments. The informant had a record of proven reliability and}
However, execution of the warrant, in spite of probable cause unrelated to the delivery, probably will not occur if the controlled delivery does not take place because of the importance of the delivered items in the ultimate prosecution of the defendant. Thus, for tactical reasons police may request a search warrant whose execution is conditioned on the occurrence of a future event.

Alternatively, police may have merely a reasonable suspicion that an individual is engaging in illegal drug activity but may not have probable cause to initiate a search for evidence.\(^{114}\) Or, information concerning the defendant’s drug activity may be stale. In both situations, discovery that the individual is the addressee of a shipment of drugs may give the police current probable cause, not only as to the shipment when delivered, but also to believe that other evidence of the suspected offense is on the premises. Once had obtained the critical information about plaintiffs’ apartments from Molina, one of the leaders of the drug ring. The informant asserted that he had directly observed Molina use keys to open the doors to several apartments. **"[A] balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending [the] informant's tip,"** supported a finding of probable cause.

\(^{114}\) In \textit{Garcia}, 882 F.2d at 701, an anticipatory warrant was issued for “cocaine, traces of cocaine, currency, drug records, and narcotics paraphernalia.” The court stated that issuance of the warrant preceded delivery and was “without any probable cause to believe that contraband was currently located on the premises.” The court later stated,

Had the only evidence been that the duffel bags were being delivered to the apartment, the scope of the search, described in the warrant might have been overbroad. Here, however, additional facts in the supporting affidavit gave rise to probable cause to believe that the apartment was being used as a storage and distribution center for drugs. Coupled with the delivery of the drugs by Hooks and Oliver according to the plan set by [defendant], these facts support the broadened scope of the anticipatory warrant.

\textit{Id.} at 704.
again delivery may not be necessary to probable cause.\textsuperscript{115} The interception of a shipment of drugs to an individual suspected of drug distribution, together with other available information, may be sufficient to get a warrant to search the individual's premises for other evidence of drug distribution. The delivery of the shipment and its acceptance by the defendant provide stronger evidence for a trial on drug distribution charges, but delivery and acceptance may not be necessary to define the scope of the search.

Therefore, in both situations of preexisting probable cause and suspicion, the delivery affects the timing of the search. If the warrant execution was conditioned on delivery for tactical reasons, it is a conditional warrant. The scope of the search, however, will be determined not by the delivery but by the additional information presented in the warrant.

A second general category of cases to consider are those where police have little or no information concerning the recipient of the delivery other than the delivery itself. Therefore, no probable cause to search exists without the delivery.\textsuperscript{116} Delivery is not merely a timing tool for gathering the greatest amount of evidence possible.

Without more information, acceptance of a package of drugs should provide probable cause only to enter the premises to retrieve the recently delivered package and not a basis for seizure of additional evidence related to the drug trade.\textsuperscript{117} However, when the

\textsuperscript{115} Because police are unlikely to execute an anticipatory warrant without delivery to the described premises, there are no cases that hold that merely being an addressee of a shipment of drugs, together with other information, is sufficient probable cause to search for other evidence of drug distribution. People v. Singer, 354 N.Y.S.2d 178 (N.Y. App. Div. 1974), however, comes closest. Police obtained a warrant for defendant's premises conditioned on an observed delivery to the premises. The warrant specified seizure of the observed delivery, other drugs, paraphernalia, and written records of drug trafficking. However, the delivery by Railway Express to the defendant's premises did not take place. Instead, the defendant went to the Railway Express office to pick up the shipment. The defendant was arrested when he accepted the shipment. The court approved the subsequent search of the defendant's premises because probable cause was established by the previously available information and the defendant's arrest with a significant quantity of drugs in his possession.

\textsuperscript{116} See United States v. Weber, 915 F.2d 1282, 1287 (9th Cir. 1990) (In limiting the scope of a search under an anticipatory warrant, the court noted that there was no information establishing probable cause as to any evidence other than the delivery.). In United States v. Moore, 742 F Supp. 727, 737 (N.D.N.Y. 1990), the affidavit set forth no information concerning other drug activity at the premises. Without information in addition to the controlled delivery, there was no probable cause to believe that the premises would contain records of other drug transactions.

\textsuperscript{117} See Moore, 742 F Supp. at 727. In United States v. Feldman, 366 F Supp. 356, 363 (D. Haw. 1973), the court found that a warrant authorizing seizure of "documents and
quantity of drugs is a distributable amount, given the realities of the drug trade, it should take very little to justify probable cause to expand the search to look for records and other items commonly used in drug distribution.\footnote{118} Once the scope is expanded to include other concealed items, the entire premises is opened for inspection, and all items in plain view during the validly authorized intrusion are also subject to seizure.\footnote{119}

Cases dealing with delivery of child pornography involve slightly different considerations. In most reported cases, police have substantial background information on the defendant-addresssee and have probable cause to believe that the defendant possesses seizable evidence other than the controlled delivery.\footnote{120} However, proof of the offense, which is receipt of child pornography from the mail, not merely possession, is made possible by the controlled delivery. Acceptance of the controlled delivery establishes the probable cause

\footnote{118} See Segovia, 800 F.2d at 41 (Without any apparent challenge to probable cause to seize items other than the anticipated delivery, the court indicated that the only information police had concerning defendants was a sample of cocaine, the delivery, and the informant's earlier statement that defendants were trafficking in cocaine. Seizures of the delivered package, "drug paraphernalia, money, records and a pistol" were validated.); Rivera, 728 F. Supp. at 256 (scope of search justified by informant's claims that the delivery would be packaged and redistributed and by officer's prior experience at the address); Commonwealth v. Soares, 424 N.E.2d 221, 225 (Mass. 1981); see also Weber, 915 F.2d at 1284 (Expert information concerning "child molesters," "pedophiles," and "child pornography collectors" was meaningless in a probable cause determination where there was no evidence that defendant fit into one of the listed categories.); Peden, 891 F.2d at 518-19 (Based on the expertise of the investigator in child pornography cases, the court indicated that a magistrate could find probable cause that certain categories of evidence would be on the premises of a pedophile even though the police had no direct evidence that the specific defendant had or would have those items on his premises. The expert also presented information from which the magistrate could conclude that the defendant was a pedophile.).

\footnote{119} See Soares, 424 N.E.2d at 223-24. Andresen v. Maryland, 427 U.S. 463 (1976), also has been cited as a viable basis for seizure of items not specifically listed in the warrant.

\footnote{120} See United States v. Flippen, 674 F Supp. 536, 537 (E.D. Va. 1987), aff'd, 861 F.2d 266 (4th Cir. 1988) (The court ruled that a warrant based solely on a controlled delivery was invalid for seizure of the delivery. However, the listing of other seizable materials in the warrant was supported by probable cause without regard to the controlled delivery. Therefore, those materials could be validly seized.). But see Weber, 915 F.2d at 1287 (insufficient information in addition to delivery).
justifying execution of the warrant. Once delivery is accepted and the crime committed, police will want to search to re-seize the delivered material. Police also will want to seize other circumstantial evidence supporting the charge, such as other child pornography, supplier lists, correspondence, and order forms relating to the controlled delivery. None of the latter materials are illegal to possess, but they support the charge of illegal receipt. Once again the scope of the search is extensive.

Other than attacking the anticipatory element of the warrant, defendants generally have been only modestly successful in challenging the existence of probable cause to engage in a search broader than mere retrieval. Additionally, defendants have had some success challenging seizure of specific items because the warrant was overbroad or the items were not specifically described in the warrant. For example, two cases have ruled that authorization for the seizure of child pornography does not justify seizure of adult pornography. Other cases, however, have been more

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121 Weber, 915 F.2d at 1282; Moore, 742 F Supp. at 727. But see Peden, 891 F.2d at 514, where defendant asserted that there was no probable cause to seize any material other than the controlled delivery. The court suggests there was a strong basis for probable cause to seize the additional circumstantial evidence. In addition to personal information concerning the defendant, the court also appeared to consider a general statement about the type of materials that a pedophile would keep on the premises:

In addition, based on her experience investigating pedophiles and the sexual exploitation of children, agent Forman's affidavit asserted that pedophiles often maintain certain other types of materials: large collections of books, magazines, videos, and films containing child pornography; the addresses of and correspondence with other pedophiles; and supplier lists, order forms, and other documents pertaining to the purchasing, ordering, and advertising of child pornography.

The magistrate was also presented with Agent Forman's testimony, based on her substantial training and experience, that pedophiles often collect large quantities of certain types of child pornography, and that they correspond with other pedophiles on the subject. Although the affidavit lacked direct testimony that Peden himself was this type of compulsive pedophile, the magistrate might reasonably draw such a common-sense conclusion from the repeated documented instances of Peden's sexual interest in young boys. Id. at 516-18. However, rather than decide the probable cause issue, the court validated the seizures under the good faith exception. Id. at 519; Hale, 784 F.2d at 1469 ("The portion of the warrant that specifically described 'Bambino' and the three sets of photographs is valid."); Boffardi, 684 F Supp. at 1263 (seizure of additional material properly authorized).

122 See Hale, 784 F.2d at 1469 (Seizure of specified material was valid. Seizure of material under a general clause authorizing seizure of "'obscene, lewd, lascivious or indecent' material" was invalid.); Musgrave, 726 F Supp. at 1034 (Seizure of adult pornography was outside the scope of a warrant authorizing seizure of child pornography.).
expansive in approving seizure of other sexually explicit materials or have used plain view as a basis for seizing additional material.

One potential concern common to both drug and child pornography cases is that police may be permitting or encouraging the delivery of contraband as a subterfuge for a plain view observation or for a protective sweep of the premises. That concern does not appear to be a major issue. If police have probable cause without the anticipated delivery and are merely using the delivery as a timing device, then the scope of the search will be the same with or without delivery. The same opportunities exist to abuse the search process in each situation. Therefore, unless it is constitutionally offensive to use an anticipated delivery as a timing device, police actions have not altered the scope of the possible search.

Also, if delivery is required to generate probable cause to search, then the police conduct of permitting delivery is valid if the purposes of controlled deliveries are valid. Thus, if identifying the defendant and timely re-seizure of at least the evidence of an accepted delivery are appropriate purposes, then police are not on the premises solely as a subterfuge for a broader search. The validity of the scope of the search, whether by sweep of the premises or by plain view, is governed by considerations unrelated to the validity of the anticipatory search warrant.

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See Dornhofer, 859 F.2d at 1198 (The court ruled that a warrant is sufficiently specific when it "describes the sought for material 'in the graphic terms of the statute on the sexual exploitation of children.'"); United States v. Rabe, 848 F.2d 994, 997 (9th Cir. 1988) (The warrant was not overbroad in permitting the officer to search for materials "depicting minors engaged in sexually explicit conduct as those terms are defined in 18 U.S.C. 2255."); see also Peden, 891 F.2d at 517-18 (suggesting that the specificity in Dornhofer was sufficient); Nelson, 847 F.2d at 289 (Merritt, J., dissenting) (Although not discussed directly in the majority opinion, the dissenting opinion suggests that seizure of paperback books was not within the authorization to seize "films or 'photographic depictions of minors involved in sexually explicit conduct'").

But see Hale, 784 F.2d at 1469 (The court invalidated a seizure of a magazine because it was not specified in the warrant. Citing Maryland v. Macom, 472 U.S. 463 (1985), the court found that seizure of material protected by the first amendment "requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances.").

ally, if police claim to be relying on an informant in an uncontrolled delivery situation, the potential for police fraud appears no greater than in other undisclosed or unknown informant situations\textsuperscript{126} and again is unrelated to the validity of anticipatory search warrants.

IV Good Faith Exception

Although anticipatory search warrants are not illegal \textit{per se}, it is possible that they may be invalid for failure to meet fourth amendment requirements. Where the warrant is invalid, an additional issue to consider is the application of the exclusionary rule's good faith exception to the issuance and execution of the warrant.

Exclusion of evidence is designed to deter police from unreasonable intrusions on individual privacy. When police have a search warrant on which they reasonably and in good faith rely to seize evidence, exclusion no longer serves as a deterrent. In those situations, the invalid warrant and the ensuing intrusion are the result of a mistake by the magistrate. The Supreme Court has determined that exclusion of evidence does not have a significant deterrent effect on the magistrate.\textsuperscript{127}

The Court also has delineated circumstances where the good faith exception is unavailable. A seizure is invalid if the officer knowingly or recklessly provides false information that was necessary to the probable cause determination, if the signing magistrate abandons the neutral and detached role of the judiciary, or if, under all the circumstances, the officer relied on a "warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"\textsuperscript{128} In short, police must demonstrate objective good faith.

Several courts have considered application of the good faith exception to seizures made pursuant to anticipatory warrants.\textsuperscript{129}

\textsuperscript{126} See Gates, 462 U.S. at 213.
\textsuperscript{128} Id. at 923.
\textsuperscript{129} United States v. Weber, 915 F.2d 1282 (9th Cir. 1990) (The court found that the affidavit was so deficient that official action based on the warrant was unreasonable.); United States v. Peden, 891 F.2d 514, 519 (5th Cir. 1989) (Where defendant claimed that there was no probable cause to issue a warrant for items other than the controlled delivery, the court applied the approved Leon good faith review of issuance of the warrant.); United States v. Hale, 784 F.2d 1465, 1469-70 (9th Cir. 1986); United States v. Hendricks, 743 F.2d 653, 656 (9th Cir. 1984); United States v. Moore, 742 F. Supp. 727, 737 (N.D.N.Y. 1990); United States v. McGriff, 678 F. Supp. 1010, 1016-17 (E.D.N.Y. 1988); United States v. Flippen, 674 F. Supp. 536, 540 (E.D. Va. 1987), aff'd, 861 F.2d 266 (4th Cir. 1988) (no
When applying the good faith exception to either an anticipatory or conventional warrant, care must be taken to analyze independently its application to warrant issuance and to warrant execution. Review of the circumstances of the anticipatory warrant’s issuance should proceed under the traditional approach to the good faith exception. Defense claims of reckless disregard of the truth, failure of the magistrate to remain neutral and detached, and inappropriate reliance by a police officer on a warrant obviously lacking indicia of probable cause attack the basis for probable cause and the magistrate’s fidelity to her trust. Regardless of which type of warrant is challenged for failure of probable cause, review involves identical considerations.

The anticipatory warrant, however, adds an element to warrant execution that should not be the subject of the good faith exception: evaluation of the objective determination by police, a discretionary decision, that the contingent event triggering the intrusion has occurred. This is unlike a conventional warrant where police

opinion) (After finding that anticipatory warrants for child pornography based solely on controlled deliveries are invalid for lack of probable cause, the court, without discussion, ruled the evidence admissible under the good faith exception.); State v. Wright, 772 P.2d 250, 258 (Idaho Ct. App. 1989) (Swanstrom, J., concurring).

See, e.g., McGriff, 678 F Supp. at 1017 (The court ruled that misstatements in the affidavit were irrelevant to the magistrate’s probable cause determination. The court then ruled that the police were objectively reasonable in relying on a warrant that was premised on an uncontrolled delivery.).

See, e.g., Hendricks, 743 F.2d at 653. The court ruled that the warrant was invalid because there was no nexus between the observed delivery and the premises listed in the warrant; the warrant lacked probable cause. The defendant urged that under the circumstances, the magistrate had abandoned judicial neutrality. The court responded that “[a]lthough the magistrate impermissibly delegated an element of probable cause determination to the DEA agents, i.e., whether the suitcase was at the house, it appears from the record that he did so in an effort to limit official conduct, not expand it. The magistrate did not abandon his judicial role to the officers, and the officers’ reliance on the warrant was not unreasonable.” Id. at 656.

See, e.g., Weber, 915 F.2d at 1289; Peden, 891 F.2d at 519; Hale, 784 F.2d at 1469-70 (First the court ruled that the warrant was overbroad in permitting seizure of “obscene, lewd, lascivious or indecent” material.” The court then ruled that a reasonably well-trained officer would know that materials arguably protected by the first amendment were not seizable under such a broad provision in a warrant. Thus, execution of the warrant was not objectively reasonable.); Moore, 742 F Supp. at 738; Flippen, 674 F Supp. at 541; Commonwealth v. Douglas, 503 N.E.2d 28, 31 (Mass. 1987) (After ruling that an anticipatory warrant that did not specifically designate the premises to be searched was not invalid per se, the court stated that the “particularity requirement was not met here, and a police officer can never validate a general warrant through objectively reasonable reliance on the warrant.”).

See Hale, 784 F.2d at 1470 (police officer had not acted in good faith when he seized, pursuant to an overbroad warrant provision, materials arguably protected by the first amendment); Moore, 742 F Supp. at 738 (The court refused to apply the good faith
are instructed to proceed with the search. Only in the event of new information that eliminates the probable cause basis for the warrant would police have any constitutional obligation to refrain from the intrusion.

With an anticipatory warrant, the executing officer is well aware that the magistrate has not approved the search in the absence of the triggering future event. Occurrence of the future event, by definition, could not be a part of the magistrate’s probable cause determination. Since this discretionary determination that the triggering event has occurred has not been subjected to judicial review, it should not be tested by the officer’s good faith belief that the event occurred, but instead should be reviewed by the objectively available facts without regard to good faith. The deterrence purpose of the exclusionary rule has direct application to the officer’s decision to search.

The degree of certainty of delivery required under the specific facts or in the warrant itself also should play a role in the analysis of the validity of the execution. For example, jurisdictions requiring that the contraband be on a “sure course of delivery” may reasonably demand greater objective proof of delivery than might be required where the delivery is uncontrolled. In the former situation, it is arguable that delivery should be objectively certain, while in the latter merely objectively reasonable. Any greater requirement would almost certainly render anticipatory warrants based on uncontrolled deliveries invalid.

CONCLUSION

Anticipatory search warrants currently serve both governmental and individual privacy interests. Of primary importance, the

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exception where the officer “never witnessed the delivery; nor did he learn of the delivery from any source, much less a reliable source.”); Douglas, 503 N.E.2d at 31 (When faced with a warrant where the location of the search was left to the officer’s discretion, the warrant was invalid as a general warrant and an officer could never validate the seizure by objective good faith.).

134 See supra notes 82-93 and accompanying text. When there is an uncontrolled delivery, the police decision to enter the listed premises often will be a probabilities reaction based on observation and expertise. McGriff, 678 F Supp. at 1010, involved an anticipatory warrant based on an uncontrolled delivery where agents had no information to report concerning the delivery. Execution was based on the reliability of the informant advising that a delivery would occur. There was no challenge to the warrant execution. See Rivera v. United States, 728 F Supp. 250, 257 (S.D.N.Y. 1990) (The affidavit supporting an anticipatory warrant need only show “that the agent believes there will be a delivery, why he believes it, and how reliable are his sources of information.” Again, the defendant did not attack the decision to execute even though there were no observable facts that the officer could report to demonstrate delivery.).
warrants provide judicial review of the bases for potential intrusions into private premises. The supporting affidavits should lock police into a statement of known and anticipated facts that can be reviewed after execution without the benefit of hindsight. As long as the neutral and detached magistrate can conclude that there is probable cause to search based on those historical and anticipated facts, then individual rights are protected from discretionary governmental intrusions.

On the societal or governmental side of the balance, there is significant value in retrieving or discovering seizable evidence together with gathering evidence of receipt, possession, and knowledge of offenses whose discovery is otherwise difficult to collect. Judicial refusal to validate anticipatory searches will virtually eliminate the investigative tactic of controlled or observed deliveries unless exigent circumstance entries are permitted. Yet, police reliance on exigent circumstances to justify entry denies citizens a neutral and detached review of at least the information available to police prior to the anticipated delivery. Either consequence appears to be too great a cost to society in comparison to benefits received.

Since most federal courts now hold that anticipatory warrants are constitutional, the overarching concern is the exercise of officer discretion in executing the warrant. Magistrates should carefully craft warrant guidelines to limit officer discretion. Conditions should be "explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents." One method of controlling police discretion is to provide that any deviation from the listed delivery circumstances requires notification to the issuing magistrate before the warrant is executed. The magistrate should be the neutral and detached party evaluating the probable cause impact of the changed circumstances. For example, even apparently minor changes in the delivery process may have a major impact on evaluating the reliability of the source of the delivery information and thus the probable cause determination.

But, a telephone call or in-person attempt to explain the changed circumstances to the magistrate will undoubtedly delay an intrusion, with concomitant risk of loss of the evidence. The risk of lost evidence may be viewed as a basis for an exigent circumstance intrusion buttressed by the original anticipatory warrant. In that

situations, the risk of loss analysis may follow two scenarios: the executing officer may believe that there is no time to contact the magistrate about changed circumstances; or, the officer may attempt to reach the magistrate but be unable to do so within the time necessary to ensure recovery of the evidence. To avoid giving complete discretion to the officer on the issue of exigent circumstances, the basis for the decision to proceed with the search or, where appropriate, the objective quality of the effort to reach the magistrate should be weighed against realistic and objective concerns of loss of evidence. The objective risk of loss should not be merely the concern that occurs whenever evidence is believed to be in a defendant's possession. Rather, the risk should be objectively demonstrable under the specific circumstances. Where the risk is objectively demonstrated, even though a condition of the warrant may not have been met, much of the information in the warrant has been presented to and considered by a magistrate and suggests at least potential probable cause to officers who now also reasonably believe that exigent circumstances exist.

Also, because of potential abuse of officer discretion in determining when to execute the warrant, the objectively reasonable standard should be utilized when police assert either that the delivery met the clear, concise, and narrowly drawn conditions prerequisite to execution, or that exigent circumstances required immediate entry. Good faith should not be a permitted test for the execution decision by police officers.

The courts also should carefully examine the potential scope of the warrant to determine if it is a pretext for a search the police cannot otherwise conduct. Magistrates should not rely on a delivery alone to assume that there is other seizable evidence on the premises; there should be careful assessment of all the information,

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137 For example, if the delivered items were drugs, then pedestrian traffic in and out of the premises could be an objective circumstance increasing the risk of loss of the evidence. See supra note 59.

138 Moore, 742 F Supp. at 738-39. In Moore, if clear conditions had been given, the police would not have been able to demonstrate objectively that the anticipated event occurred. As noted by that court, the good faith exception does not protect the officers' decision to search because a reasonably well trained officer would have known that the basis for the magistrate's authorization to search had not occurred. See State v. Wright, 772 P.2d 250 (Idaho Ct. App. 1989). The warrant authorization to search was conditional on a future event, but no conditions were written into the authorization. Since police never observed any events suggesting delivery, the court's three opinions should not have permitted the officers to rely on the good faith exception even though the warrant was not conditional on its face.
including the delivery, to justify a search for items that could be found anywhere on the premises. The magistrate also should make a specific determination whether there is probable cause to search independent of the anticipated delivery. Such a determination focuses the officer’s and magistrate’s attentions on the precise scope of the search and its independent justifications. It further limits police discretion when the officer assesses whether there is judicial authority to search even though delivery conditions have not been met.

A final issue is specificity of the place of the search. If the bases for execution are specifically limited and the scope of the search is limited to the container to be delivered, there may be circumstances where a court could permit a search of an unspecified but described location. When faced with a delivery process in which the suspect is observed picking up a container of narcotics, but police are unaware of its ultimate destination, the interest in proving possession with knowledge of the contents will be effectively achieved only by following the package to a resting place where the suspect’s retention of the container demonstrates such knowledge. Refusal to issue warrants in such circumstances again requires police to forgo such observed deliveries as an investigative technique. Presumably, police reliance on exigent circumstances to choose a place to search as the final destination of the container again places individual privacy in the hands of police discretion. If both forms of search are denied to police, drug traffickers will easily avoid evidence of possession with knowledge by having other persons pick up the container.

One possible solution to that problem is to place specific limitations in the warrant, allowing a search of only the first place that police observe the defendant enter carrying the container in which the defendant and the container remain for a specified period of time. Entry is clearly justified to recover the contraband and

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139 United States v. Weber, 915 F.2d 1282 (9th Cir. 1990) (The court found insufficient information to support a search beyond retrieval of a delivered package.).

140 In Moore, 742 F Supp. at 727, the court divided the warrant into anticipatory and non-anticipatory parts. The court found insufficient probable cause to execute either aspect of the warrant, but also found that the good faith exception applied to the non-anticipatory aspect of the warrant. If the issuing magistrate had more carefully evaluated the independent aspects of the search, there would have been no intrusion, and the reviewing court would not have had to resort to a good faith analysis to justify the intrusion.

141 An example could be the delivery in United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984). Although the container was addressed to defendant’s residence, once the defen-
may, but certainly is not guaranteed to, provide evidence of defendant's knowing possession of the contraband. The limitations also would deny police the unfettered discretion to decide which premises to search as "the final resting place" of the container even if they search only one premises.142

The suggested limitations will require more care in drafting affidavits and warrants than is currently evident in many of the cases and is perhaps more than can be expected in many quickly unfolding drug investigations.143 Some requirements, however, already are demanded by the courts. Those, together with additional requirements, may be an impetus to more widespread prosecutor involvement in drafting affidavits and warrants.144 Detailed limitations and enhanced prosecutor involvement should provide more reasonable bases for intrusions on individual privacy interests, without sacrificing legitimate societal attempts to investigate and prosecute criminal offenses.

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143 Time pressure is a factor one court was willing to consider when facing a good faith issue. See Weber, 915 F.2d at 1282.
144 See id.