

BYU Law Review

Volume 1999 | Issue 3

Article 1

9-1-1999

United States v. Hotal: Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants

Brett R. Hamm

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Fourth Amendment Commons](#)

Recommended Citation

Brett R. Hamm, *United States v. Hotal: Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants*, 1999 BYU L. Rev. 1005 (1999).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1999/iss3/1>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

United States v. Hotal: Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants

I. INTRODUCTION

In 1990, I received a very interesting package in a post office box. Along with the usual mail, there was a ten-by-thirteen inch brown envelope in a clear plastic bag. The bag containing the envelope stated that the item had been damaged by sorting machinery and offered the apologies of the United States Postal Service. A stamped message on the envelope read: "Return to Sender, Address Does Not Exist." Knowing that I had not sent the envelope but recognizing a poor attempt at spelling the name of the company I worked for in the return address, I opened it to find out whose mail it actually was. To my surprise, the envelope contained two pounds of compressed marijuana wrapped in numerous layers of plastic. I waited for my attorney to arrive at my apartment and then turned the contraband over to the local police. Although my apartment was never searched, I will never forget the anxiety I experienced while still in possession of the marijuana, wondering if the police were going to kick in my door at any moment.

This experience gave me an insight into the sense of security the Fourth Amendment affords law-abiding citizens every day by prohibiting unjustified police intrusions. But not everyone who receives two pounds of marijuana in their mailbox does so by accident. As to those individuals who purposely receive contraband in the mail, society has an interest in making sure that they are apprehended and convicted.

Under traditional search warrant analysis, when law enforcement officials become aware of contraband in transit to a location, they have two options: they can either wait until the contraband is delivered before attempting to obtain and execute a search warrant, or they can perform the search based upon the "exigent circumstances" exception to the warrant re-

1006 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

quirement, and seize the contraband upon its arrival.¹ Neither is an ideal option. If officers wait until the contraband is delivered to the premises before attempting to obtain a search warrant, the evidence could be destroyed or distributed before the warrant is issued and executed.² If, on the other hand, they perform a search based on exigent circumstances, a court might find that no exigent circumstance existed, and consequently suppress the evidence.³

In response to this catch-22, modern warrant analysis allows the issuance of an anticipatory warrant.⁴ An anticipatory warrant is issued prior to, but is not to be executed until after, the arrival of the contraband at the premises.⁵ While a traditional warrant is executed "forthwith," an anticipatory warrant is executed at some time in the future, if at all. For example, instead of allowing law enforcement to search forthwith, the magistrate issuing an anticipatory warrant may require that a shipment of contraband currently in transit arrive at the desired location before allowing the warrant to be executed. If the warrant is executed before the evidence has been delivered, or if the evidence is never delivered, the warrant is void.⁶ The events which must occur before the warrant can be executed, such as the arrival of contraband, are referred to as the warrant's "triggering event[s]"⁷ or "conditions precedent."⁸

1. See *United States v. Hugoboom*, 112 F.3d 1081, 1086 (10th Cir. 1997); *United States v. Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993).

2. See *Ricciardelli*, 998 F.2d at 10; *United States v. Garcia* 882 F.2d 699, 703 (2d Cir. 1989).

3. See *id.*

4. See *id.*

5. See 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.7(c), at 363 (3d ed. 1996) ("The warrant is obtained in advance of the anticipated time of delivery [of the evidence] so that it may be promptly executed when the delivery is made.").

6. See *Garcia*, 882 F.2d at 702. The conditions precedent may not occur if, for example, upon attempting delivery of the contraband, law enforcement is informed that the person the package is addressed to has moved.

7. *United States v. Hugoboom*, 112 F.3d 1081, 1085 (10th Cir. 1997); see also *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998); *Ricciardelli*, 998 F.2d at 12 (1st Cir. 1993).

8. See, e.g., *Hotal*, 143 F.3d at 1226 (requiring that package be received and taken into residence prior to warrant's execution); *United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (requiring delivery by mail to, and receipt by, Daniel Gendron of a specifically described parcel); *Ricciardelli*, 998 F.2d at 13 (invalidating an anticipatory warrant where the sole condition precedent was receipt of the package by the defendant without requiring that the package be received at the premises to be searched); *Garcia*, 882 F.2d at 704 (upholding an anticipatory warrant where its conditions prece-

The virtue of the anticipatory warrant is that it eliminates law enforcement's catch-22 while preserving Fourth Amendment protections. Because police now can obtain a warrant in advance, they no longer are forced to choose between waiting for a warrant and proceeding warrantless. Moreover, citizens benefit through the neutral magistrate's determination of probable cause and specific authorization of where to search and what to seize.

Although federal courts generally accept the constitutionality of anticipatory warrants,⁹ their place in the constitutional framework is not clearly established. Federal circuit decisions split as to whether an anticipatory warrant must give notice to officers and defendants by expressly stating upon its face the conditions upon which its execution is predicated ("particularity approach"),¹⁰ or whether it is sufficient that a judge consider

dent required only delivery of the contraband to the premises and not delivery to any specific individual). In general, it can probably be said that conditions precedent are merely a statement that the warrant cannot be executed until the contraband has arrived at the premises which the warrant authorizes to be searched.

9. All of the circuits that have addressed the issue have held that anticipatory warrants are not per se unconstitutional. See *Ricciardelli*, 998 F.2d at 11; *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *United States v. Wylie*, 919 F.2d 969, 974-75 (5th Cir. 1990); *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990); *Garcia*, 882 F.2d, at 703; *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988); *United States v. Goff*, 681 F.2d 1238, 1240 (9th Cir. 1982); *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978); *United States ex rel. Beal v. Skaff*, 418 F.2d 430, 432-33 (7th Cir. 1969). Several state courts have also upheld the constitutionality of anticipatory warrants. See *Johnson v. State*, 617 P.2d 1117 (Alaska 1980); *State v. Cox*, 522 P.2d 29 (Ariz. 1974); *Commonwealth v. Soares*, 424 N.E.2d 221 (Mass. 1981); *People v. Glen*, 282 N.E.2d 614 (N.Y. 1972).

10. This Note will repeatedly state that the particularity approach *requires* that conditions precedent appear on the face of the warrant. Of course, this statement is subject to the cure by affidavit doctrine which allows courts to consider in certain circumstances the specificity provided by the affidavit. See generally Larry EchoHawk & Paul EchoHawk, *Curing a Search Warrant That Fails to Particularly Describe the Place to be Searched*, 35 IDAHO L. REV. 1 (1998). However, cure by affidavit does not change the underlying requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Ninth Circuit in *United States v. Hotal*, 143 F.3d 1223 (9th Cir. 1998), clearly understood this distinction when it first considered whether the affidavit could cure the warrant and then considered whether the Constitution required that conditions precedent appear on the face of the warrant. See *id.* at 1225-26. It is with this understanding that one must read the court's holding that "in order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event." See *id.* at 1227. The portion of the holding stating that the conditions precedent must appear on the face of the warrant relates to the court's consideration of a time-based particularity requirement. The portion of the holding which states "or on the face of the accompanying affidavit" relates to the court's consideration of cure by affidavit. It is

1008 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

the warrant's conditions precedent in determining probable cause ("probable cause approach").¹¹ In *United States v. Hotal*,¹² the Ninth Circuit adopted a particularity approach, requiring that an "anticipatory search warrant must . . . on its face . . . clearly, expressly, and narrowly specify the triggering event."¹³ This Note agrees with the Ninth Circuit's decision. Part II of this Note provides background on the Fourth Amendment and how the terms of the amendment apply to anticipatory warrants. Part III describes the facts of *Hotal* and outlines the court's reasoning in reaching its conclusion. Part IV analyzes the particularity and probable cause approaches. Finally, part V concludes that the Ninth Circuit was correct in adopting the particularity approach.

II. BACKGROUND

A. *The Fourth Amendment*

The Fourth Amendment to the United States Constitution protects citizens from "unreasonable searches and seizures"¹⁴

the purpose of this Note to consider the Constitutional issue of whether conditions precedent must appear on the face of the warrant. The issue of when an affidavit can cure a faulty warrant is left for another day. However, it must be admitted that due to the interaction of the two issues, the only time a court's approach to conditions precedent will be outcome determinative is when the warrant does not list the conditions precedent and the affidavit cannot be used to cure it. *See, e.g., id.*

11. Although there may be some problems with the Ninth Circuit's categorization of the courts, *see infra* note 74, it is generally correct. In *United States v. Hotal*, 143 F.3d 1223, the Ninth Circuit divided the courts into two groups: those that require the conditions precedent to appear on the face of the warrant, and those that do not. The court placed itself and the First Circuit in the category of those courts that require conditions precedent to appear on the face of the warrant. *See Hotal*, 143 F.3d at 1226 (citing *Gendron*, 18 F.3d at 965 (1st Cir. 1994), for the proposition that the First Circuit had adopted the "on-the-face" requirement); *but see* *United States v. Vigneau*, 1999 WL 508810, at n.8 (1st Cir. (R.I.)) (stating that the Ninth Circuit had misinterpreted its holding). The court placed the Second, Sixth, Seventh, Eighth, and Tenth Circuits in the category of courts that do not require the conditions precedent to appear on the face of the warrant. *See id.* (citing *United States v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997); *Hugoboom*, 112 F.3d at 1086-87 (10th Cir. 1997); *United States v. Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995); *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991)).

12. 143 F.3d 1223 (1998).

13. *Id.* at 1227. For an explanation of the editing, *see supra* note 10.

14. U.S. CONST. amend. IV. The full text of the amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

by representatives¹⁵ of either the federal or state government.¹⁶ Subject to few exceptions,¹⁷ a search can be conducted only pursuant to a validly issued search warrant.¹⁸ A warrant alone, however, is not enough. The framers recognized that a search pursuant to a warrant could violate personal rights as much as

particularly describing the place to be searched, and the persons or things to be seized.

Id.

15. Although this Note focuses on the Fourth Amendment's role in law enforcement, the protections of the Fourth Amendment also limit the activities of other governmental actors such as school teachers. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[T]his Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority.' Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned premises to battle a fire, are all subject to the restraints imposed by the Fourth Amendment.

....

... If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.

Id. at 335-36 (citations omitted).

16. The Fourth Amendment originally acted as a limit only upon the activities of the federal government. *See Cady v. Dombrowski*, 413 U.S. 433, 440 (1973). However, with the adoption of the Fourteenth Amendment, the proscriptions of the Fourth Amendment have been applied to state government as well as the federal government. *See Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule to the states).

17. *See* Michael J. Flannery, Note, "*Bridged Too Far: Anticipatory Search Warrants and the Fourth Amendment*," 32 WM. & MARY L. REV. 781, 789-90 (1991); *see, e.g., Horton v. California*, 496 U.S. 128 (1990) (outlining the nature of the plain-view exception to the warrant requirement); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (recognizing that the Court has "permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable' " (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment))); *United States v. Ross*, 456 U.S. 798, 809 (1982) (holding that warrantless searches of automobiles are constitutional as long as the search is "based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained").

18. *See Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984) ("Prior decisions of this Court . . . have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated.' " (quoting *United States v. United States District Court*, 407 U.S. 297, 318 (1972))).

1010 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

a search without a warrant.¹⁹ In explaining the framers' concerns with English warrant law, the Supreme Court noted that

the general warrant specified only an offense . . . and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched. Similarly, the writs of assistance used in the Colonies noted only the object of the search—any uncustomed goods—and thus left customs officials completely free to search any place where they believed such goods might be. The central objectionable feature of both warrants was that they provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home.²⁰

Therefore, the Fourth Amendment contains additional requirements that define the nature of a warrant: “[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²¹ These requirements further limit law enforcement authority by requiring independent judicial determination of probable cause and the appropriate scope of the search. This “ensures that the search is carefully tailored to its justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit.”²² The additional protections which apply when a warrant is issued make the obtainment of a warrant a preferred practice; hence, courts have been willing to accept the idea of issuing anticipatory warrants rather than allowing the police to perform warrantless searches under the exigent circumstances exception.²³

B. ANTICIPATORY SEARCH WARRANTS

1. Search Warrant Defined

An anticipatory search warrant “is a warrant based upon

19. *See Steagald v. United States*, 451 U.S. 204, 220 (1981).

20. *Id.*

21. U.S. CONST. amend IV.

22. *United States v. Leon*, 468 U.S. 897, 963 (1984).

23. *See United States v. Garcia*, 882 F.2d 699, 703 (2d Cir. 1989) (“Courts—although 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.”).

an affidavit showing probable cause that at some future time, but not presently, certain evidence of crime will be located at a specified place.”²⁴ This type of warrant enables law enforcement to do two important things: (1) obtain the search warrant before the evidence has reached the location to be searched and (2) search a premise as soon as the evidence reaches the location. By allowing the police to do these two things, anticipatory search warrants eliminate a catch-22: “whether, on the one hand, to allow the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence in the ensuing interval, or, on the other hand, seizing the contraband on its arrival without a warrant, thus risking suppression.”²⁵ Recognizing that the purposes of the Fourth Amendment are better served when the acts of law enforcement are reviewed by a neutral magistrate, courts have favored the policy of obtaining anticipatory warrants.²⁶ Still, courts have had difficulty outlining Fourth Amendment anticipatory warrant requirements.

2. *Anticipatory search warrants and the warrant requirements*

Even though the anticipatory search warrant is a special type of warrant, it is still a “warrant,” bound by the Fourth Amendment’s requirement that “*no* Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and . . . things to be seized.”²⁷ These two requirements, probable cause and particularity, generally apply to both anticipatory and traditional warrants; however, there are some special considerations.

a. The particularity requirement. The particularity requirement demands that in order for a warrant to be valid, “nothing [can be] left to the discretion of the officer executing the warrant.”²⁸ The warrant must contain a specific description

24. 2 LAFAVE, *supra* note 5, § 3.7(c), at 362; *see also Garcia*, 882 F.2d at 702 (“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.”).

25. *United States v. Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993).

26. *See Garcia*, 882 F.2d at 703.

27. U.S. CONST. amend. IV (emphasis added); *see Garcia*, 882 F.2d at 704 (holding that “as with other search warrants, anticipatory warrants require that a magistrate give careful heed to the fourth amendment’s [particularity] requirement . . .”).

28. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)).

1012 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

of which location can be searched and what items can be seized. This means, for example, that if contraband is in a building which police know or reasonably should know is divided into subunits, the warrant can authorize a search of only those units for which probable cause exists.²⁹ Discretion cannot be given to the police to decide which units to search when they arrive on the premises.

At least one court, however, has allowed for limited police discretion when issuing an anticipatory warrant for a multiunit dwelling. In *United States v. Dennis*,³⁰ the Seventh Circuit upheld an anticipatory warrant that described the place to be searched as the “first floor apartment or second floor apartment depending on conditions being met which are expressed in the application.”³¹ The application affidavit requested “permission to search the first floor apartment *if and only if* an occupant of that apartment accepts delivery or opens the package or the second floor apartment *if and only if* an occupant of the second floor accepts delivery or opens the package.”³² The court upheld the warrant even though the warrant obviously left some discretion to the executing officers in deciding which subunit to search. Whether this type of discretion is appropriate in the context of an anticipatory warrant needs further consideration before the anticipatory warrant is settled in constitutional law.³³

b. The probable cause requirement. Anticipatory warrants also must meet the probable cause requirement. Most early objections to anticipatory warrants were based upon this requirement. Two methods of attack commonly used by defendants are (1) that the magistrate must have “probable cause to believe that the contraband to be seized is in the place to be searched at the time a warrant issues” and (2) that probable cause to search one place can never exist when the contraband

29. See *Maryland v. Garrison*, 480 U.S. 79, 85 (1987).

30. 115 F.3d 524, 529 (7th Cir. 1997).

31. *Id.* at 529 n.1.

32. *Id.* at 528. Even though the warrant referred to the terms in the application, there was no evidence that the application actually accompanied the warrant to the scene of the search. The failure of the application, which contained the conditions, to accompany the warrant to the scene of the search may present a problem of its own. See *infra* notes 120-22 and accompanying text.

33. For a discussion of what type of discretion, if any, should be allowed in the context of anticipatory warrants, see *infra* notes 112-19 and accompanying text.

is currently known to be located at another.³⁴ At first glance the arguments may appear to be the same, but they are different. The first argument deals with what the magistrate must believe, the second argument goes to how certain that belief must be, or in other words, what is probable cause. Despite these differences, the two contentions do have one thing in common—they both have been rejected by the federal circuit courts.³⁵

(1) *Probable cause to believe the contraband is at the targeted location of the search when the warrant is issued.* The courts have noted that the Fourth Amendment does not expressly require that the evidence “presently be located at the premises to be searched.”³⁶ Any such claim can only be implied from terms in the amendment.³⁷ If the defendant claims that the requirement arises under the probable cause language of the Amendment, the issue merges into the question of what is probable cause, the focus of the second of two arguments discussed below. The only other potential source of this requirement is the unreasonableness clause. In response to this approach, courts have held that “[t]here is nothing unreasonable about authorizing a search for tomorrow, not today, when reliable information indicates that . . . the [evidence] will reach the house, not now, but then.”³⁸ On the more practical side, courts have noted that all that has ever been required is that the evidence likely will “be found at the described locus at the time of the search.”³⁹

If defendants rely on the probable cause language of the

34. *United States v. Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993).

35. *See id.*; *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989); *United States v. Washington*, 852 F.2d 803, 804 (4th Cir. 1988); *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978).

36. *Ricciardelli*, 998 F.2d at 10.

37. *See United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (finding that the Constitution requires that “a search must not be ‘unreasonable,’ and that warrants must be supported by ‘probable cause,’ ” but it does not require that the warrant be executable upon issuance (quoting U.S. CONST. amend IV)).

38. *Id.*; *see also 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.”).

39. *Ricciardelli*, 998 F.2d at 10 (emphasis omitted). Probable cause does not require a certainty that the evidence will be at the described location, it merely requires a probability that it will be at the location. *See id.* The Supreme Court has described the standard as one of a “fair probability that contraband . . . will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

1014 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

Fourth Amendment in arguing that evidence must be located on the premises when the warrant is issued, then the only issue is when probable cause to issue a warrant really exists. If, on the other hand, defendants rely on the “unreasonable” language, the present location of the evidence “is immaterial, so long as ‘there is probable cause to believe that it will be there when the search warrant is executed.’”⁴⁰ In this case, the court must determine what constitutes probable cause that the evidence will be at the specified location when the search warrant is executed.

(2) *Determining whether probable cause can exist before the contraband has reached the locus of the search.* To issue any warrant, the magistrate must be convinced beyond a “bare suspicion” that the evidence will be located on the premises at the time of the search.⁴¹ In making her decision, the magistrate must consider whether a person of reasonable caution would believe that the evidence is likely to be at the premises to be searched when the warrant is executed.⁴² For an anticipatory warrant, this means that the magistrate must have a credible reason for believing that although the evidence is not currently located on the premises, it will be there when the warrant is executed.⁴³

The courts have “adopt[ed] the ‘sure and irreversible course’ standard” for judging the validity of anticipatory warrant probable cause determinations.⁴⁴ When the contraband is on a sure and irreversible course to the premises to be searched, it is likely that the evidence of a crime will be “at the described locus at the time of the search.”⁴⁵ As the First Circuit explained,

[T]he sure course standard functions as a proxy for the actual presence of the contraband at the locus to be searched. It offers the magistrate a trustworthy assurance that the contraband, though not yet on the site, will almost certainly be located there at the time of the search, thus fulfilling the

40. *Garcia*, 882 F.2d at 702 (citing *Lowe*, 575 F.2d at 1194).

41. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949).

42. *See id.*

43. *See Ricciardelli*, 998 F.2d at 12.

44. *Id.* at 13; *see also* *United States v. Leidner*, 99 F.3d 1423, 1427-28 (7th Cir. 1996); *United States v. Wylie*, 919 F.2d 969, 974 (5th Cir. 1990); *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990); *Garcia*, 882 F.2d at 702-03; *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988); *United States v. Hale*, 784 F.2d 1465, 1468 (9th Cir. 1986).

45. *Ricciardelli*, 998 F.2d at 10 (emphasis omitted).

requirement of future probable cause.⁴⁶

Generally, the “sure and irreversible course” standard is met when law enforcement has current possession of the contraband and is in control of its delivery. For example, when the government has conducted a child pornography sting operation and is actually the entity filling orders,⁴⁷ the chance that the evidence will not be delivered to the premises is minimal, since law enforcement officers realize that the contraband must be delivered before the search can begin. The standard is also met when drugs, intercepted by postal inspectors, are then delivered to the defendant under controlled circumstances.⁴⁸ Since evidence does not have to be at the location when the warrant is issued, and because there can be probable cause to justify issuing an anticipatory warrant, anticipatory warrants are not per se unconstitutional.⁴⁹ The question becomes whether any additional constitutional or non-constitutional requirements should be imposed on the issuance of anticipatory warrants.

*c. Conditions precedent: an additional requirement for the issuance of anticipatory warrants.*⁵⁰ Since there is a greater

46. *Id.* at 13.

47. *See, e.g.*, *United States v. Rowland*, 145 F.3d 1194 (10th Cir. 1998); *United States v. Ruddell*, 71 F.3d 331 (9th Cir. 1995); *Ricciardelli*, 998 F.2d at 8; *United States v. Koelling*, 992 F.2d 817 (8th Cir. 1993); *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988).

48. *See, e.g.*, *United States v. Leidner*, 99 F.3d 1423 (7th Cir. 1996) (intercepting marijuana being shipped from Texas to Illinois); *United States v. Becerra*, 97 F.3d 669 (2d Cir. 1996) (intercepting cocaine shipped from Columbia to New York); *United States v. Moetamedi*, 46 F.3d 225 (2d Cir. 1995) (intercepting drugs being express mailed from Pakistan to New York); *United States v. Lawson*, 999 F.2d 985 (6th Cir. 1993) (intercepting drugs being express mailed); *United States v. Tagbering*, 985 F.2d 946 (8th Cir. 1993) (intercepting marijuana sent from Jamaica to Kansas City); *United States v. Wylie*, 919 F.2d 969 (5th Cir. 1990) (intercepting cocaine shipped via the United Parcel Service from Texas to Minnesota); *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989) (intercepting cocaine shipped from Panama); *United States v. Lowe*, 575 F.2d 1193 (6th Cir. 1978) (intercepting heroin being sent from Thailand to Detroit).

49. *See Ricciardelli*, 998 F.2d at 11 (finding “it unsurprising that every circuit to have addressed the question has held that anticipatory search warrants are not categorically unconstitutional”) (citing as examples *Tagbering*, 985 F.2d at 950; *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990); *Wylie*, 919 F.2d at 974-75; *Goodwin*, 854 F.2d at 36; *United States v. Goff*, 681 F.2d 1238, 1240 (9th Cir. 1982); *Lowe*, 575 F.2d at 1194; *United States ex rel. Beal v. Skaff*, 418 F.2d 430, 432-33 (7th Cir. 1969); *see also Garcia*, 882 F.2d at 703.

50. It should be noted that anticipatory warrants can be prohibited or limited by the terms of a state constitution or a statute. *See, e.g.*, *United States v. Hugoboom*, 112 F.3d 1081, 1085 n.5 (10th Cir. 1997) (due to the circumstances of the case, the court did not decide whether anticipatory warrants violated Article I, Section 4, of the Wyoming Constitution); *Kostelec v. State*, 703 A.2d 160 (Md. 1997) (holding that MD. CODE ANN.

1016 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

chance of abuse with an anticipatory warrant than a traditional warrant,⁵¹ courts have required that the triggering events, or conditions precedent, be “explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents.”⁵² Although the “conditions precedent . . . are integral to [an anticipatory warrant’s] validity,”⁵³ courts are split as to how this requirement should be treated.

(1) *The probable cause approach to conditions precedent.*

The majority of the circuits view the conditions precedent as “mere guarantees that the probable cause determination at the time of issuance has reached fruition when the warrant is executed.”⁵⁴ By the term “mere,” these courts mean that the conditions precedent are needed only for the magistrate to determine in the first instance that probable cause to search will exist when the warrant is executed, and in the second instance that probable cause did exist when the warrant was executed. Since the conditions precedent are merely determinations of probable cause, they do not have to be included in the warrant as the place, person, and items must be.⁵⁵ Under this approach, as long as the magistrate concludes that the fulfillment of the conditions precedent ensures the existence of probable cause at the time of a warrant’s execution and the conditions are followed by the executing officers, the anticipatory warrant is valid.⁵⁶ The reasoning behind this approach has never been

art. 27, § 551 (1997) does not allow for the issuance of anticipatory warrants). When the prohibition is due to statute only, legislatures may quickly change the permissibility of issuing anticipatory search warrants. *Compare* *State v. Scott*, 951 P.2d 1243, 1247 (Haw. 1998) (holding “that the plain and unambiguous language of [HAW. REV. STAT.] § 803-31 does not permit the issuance of an [anticipatory search warrant]”), *with* *State v. Opupele*, 967 P.2d 265 (Haw. 1998) (noting that HAW. REV. STAT. § 803-31 (1998) had been amended since the *Scott* decision earlier in the year, and now allowed the issuance of anticipatory search warrants). The purpose of this note, however, is to address the place of the anticipatory warrant in the framework of the Constitution.

51. *See Ricciardelli*, 998 F.2d at 12.

52. *Id.* at 12 (citing *Garcia*, 882 F.2d at 703-04).

53. *United States v. Dennis*, 115 F.3d 524, 528 (7th Cir. 1997).

54. *United States v. Rowland*, 145 F.3d 1194, 1202 (10th Cir. 1998); *see Dennis*, 115 F.3d at 529; *Hugoboom*, 112 F.3d at 1086-87; *United States v. Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995); *Tagbering*, 985 F.2d at 950; *United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991).

55. *See United States v. Hotal*, 143 F.3d 1223, 1226 (9th Cir. 1998) (finding that “although some of the circuits have suggested that it would be more ‘efficient’ or preferable for an anticipatory warrant to state on its face the conditions necessary for its execution, none has found the failure to do so to constitute a Fourth Amendment violation”) (citations omitted).

56. *See Hugoboom*, 112 F.3d at 1087; *Rey*, 923 F.2d at 1221.

completely explained,⁵⁷ but it does have the appearance of a “no harm, no foul” approach to the Fourth Amendment. Courts have upheld anticipatory warrants in situations where the affidavit contained the conditions precedent and it was shown after the search that the conditions precedent had occurred prior to the warrant’s execution,⁵⁸ and where the magistrate orally informed the police of the conditions precedent and it was demonstrated that they had been met.⁵⁹

(2) *The particularity approach to conditions precedent.* The other approach to conditions precedent is to require that the conditions appear on the face of the warrant, and not just in the affidavit.⁶⁰ This approach essentially writes a new particularity requirement into the Fourth Amendment. In addition to requiring the warrant to particularly describe the place to be searched and items to be seized, the warrant must also particularly describe the conditions precedent for execution. If the warrant does not contain the conditions precedent for execution, the warrant is void.⁶¹ In *United States v. Hotal*, the Ninth Circuit decided between these two approaches.⁶²

57. The Sixth Circuit has never fully explained why it adopted the probable cause approach. See *Rey*, 923 F.2d at 1221. In *Rey*, the court found that conditions precedent do not have to appear on the face of the warrant when a “reasonable inference can be made that the warrant authorizes a search only after the controlled delivery has occurred.” *Id.* What the court failed to explain was how a “reasonable inference” related to the constitution.

58. See *Moetamedi*, 46 F.3d 225.

59. See *United States v. Leidner*, 99 F.3d 1423 (7th Cir. 1996).

60. See *United States v. Hotal*, 143 F.3d 1223, 1226 (9th Cir. 1998) (finding that “when a warrant’s execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution”).

61. See *id.* at 1227. As with the other particularity requirements, however, this statement is subject to the cure by affidavit principle which allows courts to consider in certain circumstances the specificity provided by the affidavit. See *supra* note 10. Although all the circuits agree that an insufficiently particular warrant can be cured by the terms in the affidavit under certain circumstances, the circuits vary in the standard they require for cure by affidavit. See *EchoHawk & EchoHawk*, *supra* note 10, at 14-22. Some courts require that the affidavit be incorporated by, and accompany, the warrant to the locus of the search if it is to cure the warrant’s description. See *United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997); *United States v. Morris*, 977 F.2d 677, 681 n.3 (1st Cir. 1992); *United States v. Johnson*, 690 F.2d 60, 64 (3^d Cir. 1982). Other circuits merely require that the circumstances surrounding the execution of the warrant demonstrate the functional equivalence of having the affidavit incorporated by, and accompanying, the warrant for cure by affidavit to occur. See *United States v. Jones*, 54 F.3d 1285, 1291 (7th Cir. 1995); *United States v. Bianco*, 998 F.2d 1112, 1116-17 (2^d Cir. 1993); *United States v. Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982).

62. 143 F.3d 1223 (9th Cir. 1998).

1018 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

III. *UNITED STATES V. HOTAL*A. *Facts*

As part of a government sting operation, mailings were sent to certain individuals, offering them the chance to purchase child pornography. In response to this mailing, the government received a request for two videotapes from John David Hotal.⁶³ To complete the sting, postal inspectors planned a controlled delivery of the videotapes and, on January 23, 1996, sought an anticipatory search warrant of Mr. Hotal's residence.⁶⁴

In the application affidavit for the anticipatory search warrant, United States Postal Inspector Rhonda Bowie stated that the package containing the two videotapes would be delivered the following day around one o'clock.⁶⁵ "The affidavit further stated that the package [would] be kept under surveillance" until it was received by an individual at the residence and taken inside, at which time the warrant would be executed.⁶⁶ Although the application was for an anticipatory warrant, the warrant actually issued by the magistrate directed that the premises be searched "forthwith."⁶⁷ The warrant contained no statement that it was an anticipatory warrant, nor any description of the conditions precedent for its execution.⁶⁸

On January 24, 1996, the videotapes were delivered to Hotal, who signed for them and took them inside his residence. A few minutes later, Bowie and several other officers executed the warrant. Although the warrant stated that "Bowie's affidavit was attached and incorporated by reference," the record contained no evidence that the affidavit accompanied the warrant to the scene of the search.⁶⁹

Hotal filed a motion to suppress the evidence seized in the search. One of the grounds for the motion was "that the warrant failed to specify that it was not to be executed until after the delivery of the videotapes."⁷⁰ The trial court denied Hotal's

63. *See id.* at 1224.

64. *See id.*

65. *See id.*

66. *Id.* at 1224-25.

67. *Id.* at 1225.

68. *See id.*

69. *Id.*

70. *Id.*

motion to suppress, and he subsequently was found guilty of receiving and possessing child pornography. On appeal, the Ninth Circuit reversed the district court's denial of the motion to suppress.

B. The Court's Reasoning

The Ninth Circuit addressed two issues: (1) whether the application affidavit could cure the warrant, and (2) whether the warrant was constitutionally sufficient.

Concerning the first issue, the court rejected the government's contention that the problems with the warrant could be cured by the affidavit. Although the warrant incorporated the affidavit and stated that the affidavit was attached, as required for an affidavit to cure a warrant in the Ninth Circuit, no evidence in the record showed that the "affidavit had accompanied the warrant at the time of search."⁷¹ The court's previous decisions show that the government must prove that circumstances for cure by affidavit were present.⁷² Since the government had not met its burden of proof, the court would not allow the affidavit to be considered in determining the sufficiency of the warrant.

The court next addressed the issue of the constitutionality of the warrant itself. The issue of "whether an anticipatory search warrant lacks sufficient particularity when it does not identify the event on which the execution of the warrant is conditioned and when instead it erroneously authorizes the search 'forthwith' "⁷³ was one of first impression in the Ninth Circuit. The court, however, was not without guidance. Noting a split among the circuits as to the appropriate standard of constitutionality,⁷⁴ the Ninth Circuit was influenced by the

71. *Id.* at 1225.

72. *See id.* at 1225-26 (citing *United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997); *United States v. Van Damme*, 48 F.3d 461, 465-66 (9th Cir. 1995)).

73. *Id.* at 1226.

74. *See supra* notes 52-60 and accompanying text. Categorizing the circuits is not a simple matter because the issue of conditions precedent can become entangled with the issue of cure by affidavit. In the case cited by the Ninth Circuit for the proposition that the Second Circuit does not require the conditions precedent to appear in the warrant, it is unclear whether the Second Circuit made the determination based on a view of conditions precedent or cure by affidavit. *Compare Hotal*, 143 F.3d at 1226, *with United States v. Moetamedi*, 46 F.3d 225, 228-29 (2d Cir. 1995) (citing as authority Eighth Circuit cases dealing with both anticipatory warrants and cure by affidavit in general). The cases cited by the Ninth Circuit for the proposition that the Seventh and Eighth Circuits do not require conditions precedent to appear on the warrant were

1020 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

First Circuit rule that “when a warrant’s execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow.”⁷⁵

In explaining its holding that a warrant’s conditions precedent must appear on its face, the Ninth Circuit relied upon the purposes behind the Fourth Amendment’s particularity requirement:⁷⁶ namely, to limit the discretion of the executing officers and to inform the person subject to the search of its justifiable scope.⁷⁷ The court also held that a violation of a condition precedent is as great an intrusion upon personal rights as an improper description of the place to be searched.⁷⁸

IV. ANALYSIS

An anticipatory warrant’s conditions precedent are essential to its validity.⁷⁹ However, courts differ on whether the con-

clearly decided based upon cure by affidavit principles and not on an independent analysis of conditions precedent. *Compare Hotal*, 143 F.3d at 1226, *with* *United States v. Dennis*, 115 F.3d 524, 528-29 (7th Cir. 1997) (holding that the failure of the warrant to list the conditions precedent was cured by the affidavit); *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) (holding that the affidavit was incorporated by the warrant so it could be considered as part of the warrant). However, it is clear that the Seventh Circuit does not require conditions precedent to appear on the face of the warrant independent of cure by affidavit considerations. *See United States v. Leidner*, 99 F.3d 1423, 1427 (7th Cir. 1996) (holding that the court was “not compelled by the Constitution to require [the conditions precedent to appear in the warrant] since all that is constitutionally required is that the search warrant be supported by probable cause”). Unlike some circuits, the Tenth Circuit is easy to categorize. In dealing with cure by affidavit, the Tenth Circuit has held that “the affidavit and search warrant must be physically connected so that they constitute one document . . . and . . . the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference.” *United States v. Leary*, 846 F.2d 592, 603 (10th Cir. 1988) (citations omitted). In dealing with the question of conditions precedent, the Tenth Circuit imposed no such restrictions, relying solely upon the appearance of the conditions precedent in the affidavit. *See United States v. Hugoboom*, 112 F.3d 1081, 1087 (10th Cir. 1997).

75. *Hotal*, 143 F.3d at 1226; *but see United States v. Vigneau*, 1999 WL 508810, at n.8 (1st Cir. (R.I.)) (stating that the Ninth Circuit had misinterpreted its holding in *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993)).

76. *See id.* at 1227.

77. *See id.* (citing *McGrew*, 122 F.3d at 850).

78. *Id.* (noting the equal constitution requirement that “all parties be advised when the search may first take place, and the conditions upon the occurrence of which the search is authorized and may lawfully be instituted”).

79. *See United States v. Dennis*, 115 F.3d 524, 528 (7th Cir. 1997) (holding that the “conditions precedent . . . are integral to [an anticipatory warrant’s] validity”); *see also Hugoboom*, 112 F.3d at 1085 (holding that anticipatory warrants are not per se unconstitutional “so long as the conditions precedent to execution are clearly set forth

ditions precedent are to be treated solely as a matter of probable cause, or whether the conditions precedent should be treated as a time-based particularity requirement.⁸⁰ This Part analyzes the two approaches courts have taken to conditions precedent. First, the strengths and weaknesses of each approach are analyzed. Next, this Part considers the two approaches in light of the balancing tests used by the courts in determining the proper balance between the competing interests behind the Fourth Amendment: namely, society's interest in effective law enforcement and the competing interest of individuals in protecting the privacy of their homes from unreasonable searches. Finally, this Part provides answers to three questions that arise once the particularity approach is adopted:

- 1) How much discretion should be allowed the executing officers;
- 2) How does the cure-by-affidavit principle effect the particularity approach; and
- 3) What impact, if any, should anticipatory warrants have on the exigent circumstances exception to the warrant requirement?

A. Comparing Approaches to Conditions Precedent

As the Ninth Circuit recognized, there are two approaches to an anticipatory warrant's conditions precedent. One approach requires that the conditions precedent be on the face of the warrant, creating an additional particularity requirement. The other approach treats conditions precedent as necessary only for the magistrate's probable cause determination.⁸¹ Both approaches have strengths and weaknesses which tend to mirror each other; the failing of one approach is the strength of the other. The Ninth Circuit, however, addressed only one weakness of the probable cause approach and the reciprocal strength of the particularity approach, disregarding other important considerations. This section will consider additional strengths and weaknesses of the two approaches to determine which one

in the warrant or in the affidavit in support of the anticipatory warrant"); *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993) (holding that "the magistrate must set conditions governing an anticipatory warrant that are 'explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents' " (quoting *United States v. Garcia*, 882 F.2d 699, 703-04 (2d Cir. 1989)).

80. *See Hotal*, 143 F.3d 1223.

81. *See id.* at 1226.

1022 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

more effectively protects Fourth Amendment interests.

1. *Literal reading versus overall intent*

The strongest argument in favor of the probable cause approach is that it conforms to the literal text of the Fourth Amendment. As the Tenth Circuit noted, "the United States Constitution only requires that a search . . . not be unreasonable, and that warrants . . . be supported by probable cause."⁸² While the text of the amendment also requires a particular description of the place, persons, and items to be searched or seized, it does not include a similar requirement for the time of execution.⁸³ There is no requirement that the exact grounds for probable cause must be recited in the warrant.⁸⁴ Therefore, once conditions precedent are considered as a matter only of probable cause, a court clearly is justified in holding that they do not have to be recited in the warrant. They need only appear in the affidavit, because it is the affidavit upon which the magistrate bases his or her determination of probable cause.⁸⁵ Under this approach, time-based conditions precedent are relevant only in a postexecution review to assure that probable cause did exist when the warrant was executed.⁸⁶ While the

82. *United States v. Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998) (quoting *United States v. Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (quoting U.S. CONST. amend. IV)) (alteration in original).

83. *See* U.S. CONST. amend IV.

84. *See Hugoboom*, 112 F.3d at 1087.

Certainly, the most efficient way to ensure that an anticipatory warrant is properly executed is to include the conditions for its execution in the warrant. We will not posit a Fourth Amendment violation requiring suppression, however, when constitutionally satisfactory conditions for execution of the warrant are stated in the affidavit that solicits the warrant, accepted by the issuing magistrate, and actually satisfied in the execution of the warrant.

Id.

85. *See Hugoboom*, 112 F.3d at 1087 (holding warrant not constitutionally defective for failing to list the conditions precedent for execution where the conditions precedent were included in the application affidavit); *United States v. Leidner*, 99 F.3d 1423, 1427 (7th Cir. 1996) (holding that the court was "not compelled by the Constitution to require [the conditions precedent to appear in the warrant] since all that is constitutionally required is that the search warrant be supported by probable cause"); *United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) (holding that although it is preferable to include the conditions precedent in the warrant, non-inclusion does not void the warrant if it can be inferred from the affidavit that the warrant is only to be executed after the triggering events do occur).

86. *See, e.g., United States v. Koelling*, 992 F.2d 817, 823 (8th Cir. 1993) (reviewing validity of warrant and noting that from the facts of the case, "it is clear that the execution of the warrant occurred after the controlled delivery had taken place").

particularity approach is not a literal reading of the amendment, it arguably is more consistent with the amendment's intent.

The probable cause approach looks at the text of the amendment as distinct units: there is a probable cause requirement and a particularity requirement. The particularity approach, on the other hand, extends the probable cause requirement by considering the amendment in its entirety. The particularity requirement's purpose is to ensure that the search does not extend into those areas and for those things for which probable cause to search does not exist. Although the magistrate does not have to express in the warrant every reason for finding probable cause, the particularity requirement does require that the magistrate express the extent of intrusion justified by probable cause. The Fourth Amendment, as a whole, requires a magistrate to express in the warrant exactly what the probable cause has justified. Conditions precedent, even though a matter of probable cause, also relate to when the magistrate has authorized a search. In keeping with the theme of the Fourth Amendment, timing should be included in the warrant.

Requiring the warrant to contain a description of when probable cause has justified a search is not as large of an innovation as it might seem. The time for execution usually is part of even traditional warrants. In a traditional warrant, the magistrate includes a description of the time for the warrant to be served as "forthwith." If the police wait too long before executing the warrant, the probable cause upon which it is based becomes stale and the warrant is no longer valid.⁸⁷ To deal with the staleness issue, jurisdictions have adopted bright line rules requiring execution of the warrant within a specified number of days.⁸⁸ The time requirement in anticipatory warrants is just

87. See *United States v. Gibson*, 123 F.3d 1121, 1124 (8th Cir. 1997) ("A delay in executing a search warrant may render stale the probable cause finding.").

88. See FED. R. CRIM. P. 41(c)(1) (requiring that the warrant "command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified"); CAL. PENAL CODE § 1534 (West 1998) (ten days); FLA. STAT. ch. 933.05 (1998) (ten days); IDAHO CODE § 19-4412 (1998) (ten days); N.Y. CRIM. P. LAW § 690.30 (McKinney 1998) (ten days); TEX. CODE CRIM. P. ANN. art. 18.06 (West 1998) (three days); UTAH CODE ANN. § 77-23-205(2) (1998) ("The search warrant shall be served within ten days from the date of issuance. Any search warrant not executed within this time shall be void and shall be returned to the court or magistrate as not executed."); see generally RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 166-89, Chart

1024 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

as important, not because probable cause will cease to exist, but because probable cause presently does not exist. Before the triggering event occurs, probable cause to search does not exist. This is the exact issue that was presented to the *Hotal* court.

In *Hotal*, the magistrate issued a warrant which authorized and directed law enforcement officers to search the premises forthwith without any qualifying language to inform the police that the warrant could not be served until the contraband had been delivered. When the warrant was issued, probable cause to search Hotal's premises did not exist; the probable cause requirement was satisfied only upon the contraband's delivery. The warrant that issued was, therefore, beyond the scope justified by probable cause because there was no justification for searching "forthwith."⁸⁹ A warrant that authorizes more than probable cause would justify is clearly void.

2. *The exclusion solution*

The second argument for accepting the probable cause approach is that an overly technical requirement is not needed to protect Fourth Amendment rights.⁹⁰ When a court determines that the evidence is on a sure course to a location, it is usually because law enforcement is in possession of the contraband, controlling its delivery.⁹¹ To invalidate the warrant and, therefore, invalidate the search as the Ninth Circuit did in *Hotal*, seems like a ridiculous result when the police see the package

III (1985).

89. However, a warrant that authorizes a search forthwith that also contains conditions precedent is not necessarily void. *See* *United States v. Ruddell*, 71 F.3d 331 (9th Cir. 1995). The term "forthwith" generally means that the warrant must be executed before the statutory time for execution has elapsed. *See id.* at 333. As long as the conditions precedent and execution are accomplished before the statutorily proscribed time period, the warrant is still valid. *See id.*

90. In other areas of Fourth Amendment analysis the courts have warned against hypertechnical standards. *See, e.g., United States v. Ventresca*, 380 U.S. 102, 109 (1965) (holding that "the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner."); *United States v. Giacalone*, 541 F.2d 508, 514 (6th Cir. 1976) (holding that "warrants are not to be read in a negative or hypertechnical manner").

91. *See, e.g., id.*; *United States v. Rowland*, 145 F.3d 1194, 1203 n.3 (10th Cir. 1998); *United States v. Dennis*, 115 F.3d 524, 530 (7th Cir. 1997); *United States v. Leidner*, 99 F.3d 1423 (7th Cir. 1996); *see also United States v. Hendricks*, 743 F.2d 653, 655 (9th Cir. 1984) (invalidating an anticipatory warrant to search the defendant's house because the evidence was not on a sure course to the site desired to be searched since the warrant merely required that the defendant take possession of the box containing contraband at the post office).

accepted by the defendant and taken into his or her home. Can there be any doubt in such a situation that contraband will be found at the site of the search? In addition, a hypertechnical requirement is not needed because the exclusionary rule acts as a general deterrent to keep police from executing the warrant before the conditions precedent occur.⁹² Under the exclusionary rule, if the warrant is executed before the conditions precedent occur, the evidence will be suppressed. Knowing this, the police will have no incentive to execute the warrant prematurely even if it does not contain the conditions precedent on its face.

The reliance of probable-cause courts on the exclusionary rule, however, ignores the framers' intent in drafting the Fourth Amendment. The framers provided for specific pre-search protections. The framers could have merely required that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"⁹³ but that was not enough. The framers provided for enumerated pre-search protections. Specifically, a warrant cannot issue unless it is based upon probable cause and particularly describes those areas for which probable cause exists. Requiring the warrant to include the conditions precedent is consistent with the particularity provisions of the warrant clause. It is for this reason that the Ninth Circuit rejected the probable cause approach. The *Hotal* court found that the probable cause approach "fail[ed] to meet any of the concerns set forth in [the Ninth Circuit's] past cases."⁹⁴ Those concerns include informing both the police and the suspect of the search and its authorized scope.⁹⁵ The probable cause approach does not concern itself with such ramifications. Instead, the approach focuses solely on the role of conditions precedent in the magistrate's probable cause analysis and leaves protections to the exclusionary rule.

In addition, the exclusionary rule would not apply in many circumstances where anticipatory warrants are executed prematurely. Generally, when an anticipatory warrant is executed

92. See *United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) ("If the warrant is executed before the controlled delivery occurs, then suppression may well be warranted for that reason.").

93. U.S. CONST. amend. IV.

94. *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998).

95. See *id.*

1026 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

early, it is void,⁹⁶ and the evidence found as a result of the search may be suppressed under the exclusionary rule.⁹⁷ The evidence, however, is not automatically excluded, as the exclusionary rule is subject to good faith exceptions.⁹⁸ If the “officers reasonably rel[y] on a warrant issued by a detached and neutral magistrate . . . such evidence should be admissible in the prosecution’s case in chief.”⁹⁹ Most notably, the police are allowed to rely on a warrant’s validity as long as it is not “facially deficient.” Thus, in some cases, under probable cause analysis, the good faith exception could result in the admission of evidence seized prematurely under an incomplete anticipatory warrant.

The truth of this statement can be better understood in the form of the following scenario: Police officers in a probable cause jurisdiction become aware that drugs are being shipped through the mail to an individual’s home. The officers would like to search the home as soon as the drugs arrive and, therefore, seek an anticipatory warrant. In the application affidavit, the officers request a warrant which will be executed only after the contraband has been delivered to the house and taken inside. The magistrate, satisfied that probable cause will exist as long as the warrant is not executed until after the conditions in the affidavit have occurred, signs the warrant. However, the warrant itself does not include the conditions precedent (the warrant could even contain an authorization to search “forthwith”). Acting on the warrant, police search the premises, but do so before the evidence has been delivered. Even though the drugs have not yet been delivered, the officers find other evidence of criminal activity. Should the evidence be suppressed? The warrant is void because it was executed prematurely. Therefore, initially the answer is yes, the evidence should be suppressed. However, the good faith exception to the exclusionary rule must be applied. Here, there is no evidence that the magistrate did not act in a neutral and detached manner or that there was no justification for the magistrate’s probable cause determination. Therefore, the police are entitled to rely

96. See *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989).

97. See *Tagbering*, 985 F.2d at 950 (“If the warrant is executed before the controlled delivery occurs, then suppression may well be warranted for that reason.”); see also *FED. R. CRIM. P.* (41)(f); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

98. See *United States v. Leon*, 468 U.S. 897, 922 (1984).

99. *Id.* at 913.

upon that determination. The police would also be able to rely on the warrant because it was not facially deficient. The warrant looked like any other which would authorize immediate search. Even if the issuing magistrate informed the applying officers that the warrant should not be executed until the affidavit's conditions precedent were fulfilled, this admonition may not be passed on to the executing officers.¹⁰⁰ Unless the defendant could find subjective reasons to defeat the executing officers' belief that the warrant was valid when executed, the evidence would be admitted.

Therefore, despite the acceptance by probable cause courts of the proposition that conditions precedent are integral to the validity of an anticipatory warrant, premature execution of warrants is not sufficiently protected against under the probable cause approach. This situation occurs because these courts fail to concede what has been conceded in other areas of Fourth Amendment analysis—that the warrant and the affidavit considered by the magistrate are two separate documents which serve differing purposes. Until these courts concede this difference, their admonitions that “magistrates issuing such warrants must protect against opportunities for . . . unfettered discretion, in part by explicitly placing conditions on execution”¹⁰¹ will make little sense. If the conditions precedent do not appear on the warrant, where has the magistrate explicitly placed conditions on execution?¹⁰² Do these courts assume that verbal instructions will be given by the magistrate to the applying officers? How is it to be guaranteed that this admonition will be passed on to the executing officers,¹⁰³ especially when, for purposes of the good faith exception, it may be best not to pass along the admonition?¹⁰⁴

The particularity approach answers these questions by requiring the conditions precedent to appear on the warrant. The magistrate does not have to rely upon a verbal admonition being passed along because each executing officer can read the warrant and ascertain what events must occur before the warrant is valid. With less opportunity for abuse, an anticipatory

100. See *United States v. Leidner*, 99 F.3d 1423, 1429 (7th Cir. 1996).

101. *United States v. Rowland*, 145 F.3d 1194, 1202 (10th Cir. 1998) (summarizing part of the holding in *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993)).

102. See *id.*

103. See *Leidner*, 99 F.3d at 1429.

104. See *supra* notes 95-97 and accompanying text.

1028 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

warrant in a particularity jurisdiction provides greater protection of Fourth Amendment rights.

B. The Particularity Approach and Balancing Tests

The Fourth Amendment represents a marker between two competing interests. On one side is the interest in being secure from unjustified government intrusion into private areas. On the other side is society's interest in effective law enforcement. As a marker, the Fourth Amendment can be moved toward one interest or the other depending on how the courts choose to interpret the wording and intent of the Amendment. In deciding where the marker should be, courts consider the two interests and try to strike the appropriate balance. This section discusses the particularity approach to conditions precedent in terms of the Supreme Court's "reasonableness" balancing test and the unwritten pragmatic balancing test.

1. The "reasonableness" balancing test

The Supreme Court's "reasonableness" balancing test involves the balancing of "the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."¹⁰⁵ "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' "¹⁰⁶ Originally, the balancing test was only used to determine when a search was reasonable outside of the warrant requirements.¹⁰⁷ However, the Supreme Court has been willing to expand the use of the balancing test beyond its original application.¹⁰⁸ Therefore, even though the balancing

105. *Maryland v. Buie*, 494 U.S. 325, 331 (1990).

106. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967)) (alterations in the original).

107. See generally *Buie*, 494 U.S. 325; see, e.g., *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (applying the balancing test to highway sobriety checkpoints); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (applying the balancing test to a school official's warrantless search of a student's purse); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968) (applying the balancing test to stop-and-frisk situations).

108. See *T.L.O.*, 469 U.S. at 358 (Brennan, J., dissenting) ("Use of a such a 'balancing test' to determine the standard for evaluating the validity of a full-scale search represents a sizable [sic] innovation in Fourth Amendment analysis."); cf. *Terry*, 392 U.S. 1. Even in *T.L.O.*, however, the court was using the balancing test in considering the " 'reasonableness' standard whose only definite content is that it is not the same test as the 'probable cause' standard found in the text of the Fourth

test previously has not been used on the particularity clause of the Fourth Amendment, such an analysis is not without justification. The balancing test is especially applicable to conditions precedent since a requirement that they appear on the face of the warrant can only be implied from the text and purposes behind the Fourth Amendment. As an implied requirement it is, therefore, especially appropriate to determine whether it is reasonable.

Since the courts have agreed that conditions precedent are vital to the validity of an anticipatory warrant under the probable cause requirement¹⁰⁹ (an area of the Fourth Amendment not covered by the balancing test because it is part of the warrant clause), this Note will not consider the general burden imposed on law enforcement or the benefits received by citizens by requiring conditions precedent. Instead, this section focuses on the marginal burdens and benefits of requiring an anticipatory warrant to contain the conditions precedent on its face as an implied particularity term rather than deeming their inclusion in the affidavit considered by the magistrate to be sufficient.¹¹⁰

At issue here are potential intrusions into the most private and important of all areas—the home—against a general governmental interest in enforcing its laws. Prohibiting unreasonable, extended governmental intrusions into the home is one of the most important interests protected by the Fourth Amendment. This interest must be balanced against the government's interest in effective law enforcement. On its own, a general governmental interest in enforcing laws has not been enough to tip the scales in favor of the probable cause approach to anticipatory warrants. This general interest must be accompanied by a more specific and important interest.¹¹¹ Allowing the condi-

test as the 'probable cause' standard found in the text of the Fourth Amendment." *T.L.O.*, 469 U.S. at 354 (Brennan, J., dissenting) (emphasis omitted).

109. See, e.g., *United States v. Dennis*, 115 F.3d 524, 528 (7th Cir. 1997) (holding that the "conditions precedent . . . are integral to [an anticipatory warrants] validity"); *United States v. Hugoboom*, 112 F.3d 1081, 1085 (10th Cir. 1997) (holding that anticipatory warrants are not per se unconstitutional "so long as the conditions precedent to execution are clearly set forth in the warrant or in the affidavit in support of the anticipatory warrant").

110. Recognizing, of course, that if this were an express requirement of the warrant clause, the balancing test would not be applicable.

111. See *Terry*, 392 U.S. at 23-24 (approving stop-and-frisks because of a "concern[] with more than the governmental interest in investigating crime" and recognizing the additional "need for law enforcement officers to protect themselves and other

1030 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

tions precedent to appear only in the affidavit considered by the magistrate for her probable cause determination would promote no specific interest beyond the government's general interest in effective law enforcement. On the other hand, potential intrusions into homes weighs as a substantial interest in favor of requiring conditions precedent to be included in the warrant.

2. *The pragmatic balancing test*

The pragmatic balancing test arises from the recognition that courts sometimes use the law to “reach[] a predetermined conclusion.”¹¹² Even though the “reasonableness” balancing test weighs the burden placed upon the individual against the interests of law enforcement that are promoted, it would be naive not to admit that courts also consider the inverse—the burden a requirement would impose on law enforcement versus the benefit to the individual. Again, this section will consider only the marginal burden placed upon law enforcement by requiring the conditions precedent to appear on the face of the warrant versus the marginal benefit to Fourth Amendment interests gained by such a requirement.

The burden on law enforcement could be significant if officers choose not to include conditions precedent on the face of the warrant. However, this is unlikely to become a major problem. Officers are interested in making sure that seized evidence will not be suppressed. They also clearly understand that a warrant must contain a particular description of the places to be searched and items to be seized. It is well within the ability of law enforcement to understand that conditions precedent must be included on the face of an anticipatory warrant or the evidence will be suppressed. After all, it makes sense that if the evidence upon which probable cause to issue the warrant is based has not yet reached the intended location of the search, the warrant should not state that police have the authority to search the premises “forthwith.” This minimal burden on law

prospective victims of violence in situations where they may lack probable cause to arrest”); *T.L.O.*, 469 U.S. at 339 (upholding the search of student’s purse by a school principal because of “the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds”); *but see* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (upholding sobriety checkpoints based upon the state interest in eradicating drunk driving).

112. *T.L.O.*, 469 U.S. at 367 (Brennan, J., dissenting).

enforcement is balanced against the need to protect citizens against the premature execution of an anticipatory search warrant.¹¹³ Once again, the balancing test clearly favors requiring the conditions precedent to appear on the face of the warrant.

C. Unanswered Questions of the Particularity Approach

Even courts which hold that conditions precedent must appear on the face of the warrant must determine what standard should be used to review conditions precedent, whether law enforcement should be given greater discretion in the area of anticipatory warrants, and whether a failure in the warrant can be cured by the affidavit.

1. Discretion of the executing officers

In the area of anticipatory warrants, courts have required that the conditions precedent be “explicit, clear, and narrowly drawn.”¹¹⁴ But under traditional particularity analysis, the description in the warrant has to be such that it leaves no discretion to the executing officer as to what places to search and what items to seize.¹¹⁵ Carrying over this analysis would necessitate that the terms “explicit, clear, and narrowly drawn” be interpreted to mean that no discretion be left to the executing officers as to when the search is to be conducted. The warrant would have to outline the conditions precedent with enough particularity so as to leave no question as to when the executing officers are to perform the search. However, the word “when” must be used in its proper sense. It should not be interpreted as requiring the magistrate to include a date and time when the warrant must be executed. Even traditional warrants usually can be executed up to ten days after being issued.¹¹⁶ Rather than defining “when” as a date and time, courts should look at the term “when” as a point within a continuum of events. The warrant must, with enough particularity to eliminate police discretion, describe at what point within a chain of events the police can execute the search warrant.

113. See, e.g., *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993); *United States v. Moore*, 968 F.2d 216 (2d Cir. 1992) (upholding search based on erroneous conclusion that the warrant at issue was not anticipatory).

114. *Ricciardelli*, 998 F.2d at 13.

115. See *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

116. See *supra* note 86 and accompanying text.

1032 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

Besides addressing how particular a warrant must be in delineating the time of execution, courts must also address the appropriate level of particularity with which the place and items to be searched or seized must be described. As previously discussed, at least one court has allowed the particularity standard to be lower when dealing with an anticipatory warrant instead of with a traditional warrant.¹¹⁷ Although the court did not address this issue specifically, there is some justification for this position. First, anticipatory warrants are used in an area where law enforcement has previously relied upon exigent circumstances to search. If the police could search under the exigent circumstances exception but instead choose to obtain a warrant, the courts should be willing to allow less particularity in the warrant. Requiring the same type of particularity that must be present in a traditional warrant may lead law enforcement to return to relying on exigent circumstances rather than obtaining a warrant, and citizens would therefore be less protected than they would be if police were getting less specific warrants issued from neutral magistrates. Second, the Fourth Amendment could be read as a single requirement for a reasonable search. The court could determine that reasonableness requires a less particular warrant when dealing with anticipatory warrants. However, these are not sufficient justifications for accepting these positions.

First, it should be noted that “a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings”¹¹⁸ Therefore, the interest in limiting the chances of abuse should be more rather than less in the area of anticipatory warrants. Second, the exigent circumstances exception may no longer be viable in certain circumstances where an anticipatory warrant can be obtained,¹¹⁹ so the idea that police should be given more leeway because they could search anyway does not exist. Third, the reading of the amendment as one large reasonableness requirement does not fit with past interpretation. The standard for determination of what constitutes a particular description has been treated separately from the reasonableness requirement in the past. All searches must be reasonable *and* all war-

117. See *supra* notes 29-31 and accompanying text.

118. *Ricciardelli*, 998 F.2d at 12.

119. See *infra* notes 123-26 and accompanying text.

rants must contain a particular description. Lowering the standard of what constitutes a particular description in an area where there is greater opportunity for abuse would undermine the entire warrant requirement.

Once the standard of particularity is set, courts must then set a standard for review in determining whether the warrant contains enough particularity. The review of the particularity of conditions precedent should be in conformity with other areas of particularity analysis. The description should, therefore, “be one of reasonable specificity,” and be read “not ‘hypertech[nical][ly]’, but in a ‘commonsense’ fashion.”¹²⁰ There is “no justification for a stricter standard in respect to specificity of time than in respect to the other two (constitutionally referenced) search parameters.”¹²¹

2. *Cure by affidavit*

Another issue that is relevant to particularity considerations is the doctrine of cure by affidavit. Generally, the affidavit cannot be considered in assessing the particularity of the warrant because of the distinction between the two documents. However, all of the circuit courts will allow the specificity in the affidavit to cure the warrant in limited situations. Although this issue has not yet been specifically addressed by the Supreme Court, the Court has implied that it too will approve the practice.¹²²

There is no reason why cure by affidavit should not be applicable to a description of the time of execution to the same extent it is applicable to descriptions of the place and items for which to search. If there is “no justification for a stricter standard in respect to specificity of time,”¹²³ there is clearly no justification for a more stringent standard for cure by affidavit. Therefore, the description in the warrant should be curable by a specific description in the warrant if the standards of cure by affidavit are met.¹²⁴ What must be avoided, however, is a lower

120. *United States v. Gendron*, 18 F.3d 955, 966 (1st Cir. 1994) (alteration in original) (citations omitted).

121. *Id.* (emphasis omitted).

122. *See Massachusetts v. Sheppard*, 468 U.S. 981, 990 n.7 (1984) (implying that the affidavit could have cured the warrant if the judge had crossed out the description in the warrant and attached the affidavit).

123. *Gendron*, 18 F.3d at 966.

124. Until the Supreme Court rules on the issue of cure by affidavit, there will

1034 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

standard of cure by affidavit. A lower standard of cure by affidavit would undermine the requirement that the time of execution be included in the warrant. It would allow the probable cause approach, which requires only that the conditions precedent be in the affidavit, to undermine the particularity approach.

3. *The effect of anticipatory warrants on exigent circumstances*

Under limited circumstances, the courts have upheld certain types of searches performed without a warrant. These exceptions have been permitted only "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"¹²⁵ One such exception is the exigent circumstances exception. Under this exception, police can search without a warrant if there is " 'a great likelihood that the evidence will be destroyed or removed before a warrant can be obtained.'"¹²⁶ The evidence must be subject to

continue to be confusion among the circuit courts over what the proper standard for cure by affidavit should be. Currently, there is a five way split among the circuits as to what the proper standard should be. The Tenth Circuit is the only circuit that requires the affidavit to be expressly incorporated by the warrant and be attached to the warrant. *See* *United States v. Dahlman*, 13 F.3d 1391 (10th Cir. 1993). The First, Third, Eighth, and Ninth Circuits require that the warrant incorporate the affidavit and that the affidavit accompany the warrant. *See* *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993); *United States v. Morris*, 977 F.2d 677, 681 n.3 (1st Cir. 1992); *United States v. Johnson*, 690 F.2d 60 (3d Cir. 1982); *United States v. Johnson*, 541 F.2d 1311 (8th Cir. 1976). The Fourth and Fifth Circuits will cure an insufficient warrant if the affidavit is either incorporated by the warrant or accompanies the warrant. *See* *United States v. Beaumont*, 972 F.2d 553 (5th Cir. 1992); *United States v. Washington*, 852 F.2d 803, 805 (4th Cir. 1988); *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981), *corrected by* 664 F.2d 84 (5th Cir. 1981). The D.C. Circuit requires that the warrant expressly incorporate the affidavit and requires that the circumstances show that the equivalence of having the affidavit accompany the warrant occurred. *See* *United States v. Dale*, 991 F.2d 819 (D.C. Cir. 1993) (*per curiam*). The Second, Seventh, and Eleventh Circuits require only the functional equivalence of incorporation and accompany. *See* *United States v. Jones*, 54 F.3d 1285 (7th Cir. 1995); *United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993); *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982). The Sixth Circuit uses two different standards depending on whether the warrant erroneously describes the place to be searched or whether the description is absent. *See* *United States v. Brown*, 49 F.3d 1162 (6th Cir. 1995) (Batchelder, J., dissenting); *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991); *United States v. Gahagan*, 865 F.2d 1490 (6th Cir. 1989). For an in depth discussion of the topic of cure by affidavit, see generally EchoHawk & EchoHawk, *supra* note 10.

125. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

126. 3 LAFAVE, *supra* note 5, § 6.5(b), at 342 (quoting *State v. Patterson*, 220 N.W.2d 235 (Neb. 1974)).

destruction or removal “before a warrant *can* be obtained.”¹²⁷ With the acceptance of anticipatory warrants, a search warrant can now be obtained before the evidence has even reached the locus of the search. Some courts have seemed to imply that even though the police can now obtain a warrant in advance of the delivery of the contraband, they retain the option of searching under the exigent circumstances exception.¹²⁸ However, the continued acceptance of exigent circumstances searches in these situations would be contrary to the preferred practice of obtaining a warrant. In anticipatory warrant situations where law enforcement is in control of the delivery of the contraband, the evidence is not subject to destruction or removal until the police place it in that situation. To allow the police to create the exigent circumstance when they could have delayed delivery long enough to obtain a warrant defeats the warrant requirement. In some circumstances, even though police do have possession of the contraband or are controlling its delivery, there will not be enough time to obtain a warrant. For example, if the police intercept a drug courier minutes before he reaches the intended location of his delivery, the police may still deliver the illegal narcotics and search the premises without an anticipatory warrant under the exigent circumstances exception. On the other hand, where contraband is located in the mails and police have several days to obtain a warrant, an exigent circumstance would not exist. Courts will have to determine on a case-by-case basis when an opportunity to obtain an anticipatory warrant negates the existence of an exigent circumstance.

V. CONCLUSION

The Ninth Circuit correctly decided that a warrant’s facial identification of conditions precedent is “not merely ‘efficient’ or preferable; it is indeed the only way effectively to safeguard

127. *Id.* (emphasis added).

128. *See* *United States v. Brown*, 49 F.3d 1346, 1348 n.2 (8th Cir. 1995) (“Although several hours passed between the time of the phone call and the time of the delivery, the police obtained neither a search nor an arrest warrant. We note that a more prudent procedure would have been to obtain a conditional ‘anticipatory’ search warrant.”); *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990) (“We know of no precedent, . . . that *requires* law enforcement officials to try to obtain an anticipatory warrant if they may possibly be able to justify one.”); *United States v. Panitz*, 907 F.2d 1267, 1270-71 n.3 (1st Cir. 1990) (“Appellants have directed us to no federal case purporting to *require* that the government obtain an anticipatory search warrant.”).

1036 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

against unreasonable and unbounded searches.”¹²⁹ By requiring conditions precedent to appear on the face of a warrant, the particularity approach ensures that both the police and the subject of the search will be informed of the time at which the warrant properly may be executed. In the situation described in the Introduction, I was worried about the police coming to search my apartment even though I had nothing to hide but the two pounds of marijuana someone had decided to ship using my post office box as the return address. At least I knew that the police might possibly be coming and the reason for their visit. If, on the other hand, they had arrived at my apartment with a warrant authorizing a search “forthwith,” and I had not yet picked up my mail, I can only imagine the feeling of shock I would have then felt and the resentment I would still be feeling to this day. The Fourth Amendment is meant to offer real protection to all citizens against unreasonable searches and seizures. The probable cause approach to conditions precedent for anticipatory warrants does not provide enough protection of Fourth Amendment interests. The particularity approach, on the other hand, does.

Instead of focusing on each individual clause in the Fourth Amendment, the particularity approach considers the intent of the amendment as a whole, recognizing the relationship between the particular description and probable cause phrases. By extending the requirement that the warrant must contain a description of the authorized intrusion also to include a time element, the particularity approach continues to provide the protection the framers intended.

The particularity approach further conforms to the framers’ intent by requiring judicial review prior to execution of any warrant rather than relying on the *ex post facto* exclusionary rule. Waiting until after the warrant has been executed to determine when the warrant was authorized to be served, as would occur under the probable cause approach, allows too many opportunities for Fourth Amendment rights to be subverted. Exclusion is not the solution; the framers intended that unreasonable police intrusions would be stopped before they occur.

Finally, the particularity approach protects these interests with minimal additional burdens on law enforcement. Under

129. *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998).

1005]

UNITED STATES V. HOTAL

1037

the status quo, it has been clearly established that conditions precedent are vital to the validity of anticipatory warrants. The particularity approach merely requires that these vital conditions be included on the face of the anticipatory warrant.¹³⁰ This is a very small burden to impose on law enforcement in relation to the protection it provides. In light of these considerations, the particularity approach is, therefore, the better choice for placing conditions precedent within the Constitutional framework.

Brett R. Hamm

130. Unless the terms are in an affidavit that can properly be considered under the cure by affidavit doctrine. *See supra* notes 120-22 and accompanying text.