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Comments: Anticipatory Search Warrants: State and Federal Applications and Their Future in Maryland

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ANTICIPATORY SEARCH WARRANTS: STATE AND FEDERAL APPLICATIONS AND THEIR FUTURE IN MARYLAND

I. INTRODUCTION

To combat the transportation of illegal drugs, many law enforcement agents rely on anticipatory search warrants.[1] Given the ease with which illegal drugs can be moved, waiting until they actually reach a location before obtaining a warrant may allow suspects to destroy or transfer the contraband before the warrant is executed.[2] The typical scenario for which law enforcement officials seek anticipatory warrants occurs when customs officials inspect international packages coming into the United States.[3] When customs agents alert federal or local law enforcement authorities that a package contains illegal drugs, the police cooperate with postal service officials to determine the approximate time delivery of the contraband will be made.[4] This information and any other relevant facts contributing to a probable cause determination is then set forth in an affidavit upon which a search warrant may be issued.[5]

Anticipatory warrants are used to seize contraband delivered by one of three means: (1) a controlled delivery, where a police officer poses as a delivery person and transfers the contraband; (2) an observed delivery, where customs officials intercept the contraband and notify the police who observe the contraband as it is delivered; and (3) an uncontrolled delivery where police receive a tip that contraband will be delivered, but are unaware as to who will be

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1. *See, e.g.*, Sean R. O'Brien, United States v. Leon *and the Freezing of the Fourth Amendment*, 68 N.Y.U. L. REV. 1305, 1334 (1993) (recognizing law enforcement's increased reliance on anticipatory warrants corresponding "with the escalation of the government's so-called 'war on drugs' "); *see also* BLACK'S LAW DICTIONARY 93 (6th ed. 1990) (defining an anticipatory search warrant as "[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 specified place; such warrant is to be distinguished from a premature search").
2. *See* Alvidres v. Superior Court, 90 Cal. Rptr. 682, 686 (Cal. Ct. App. 1970) ("The speed with which law enforcement is often required to act, especially when dealing with the furtive and transitory activities of persons who traffic in narcotics, demands that the courts make every effort to assist law enforcement in complying with the edicts that the courts themselves have issued.").
3. 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.7(c), at 362-63 (3d ed. 1996).
4. *See id.* at 363.
5. *See id.*

making the delivery.[6]

However, in none of these situations would a traditional search warrant uphold the subsequent search and seizure by law enforcement. Based on probable cause that evidence of a crime will be at a specified location, the anticipatory search warrant is very different from a traditional search warrant.[7] Whereas anticipatory search warrants focus on the *future*, traditional search warrants are based on probable cause that evidence of a crime is *presently* at a specified location.[8]

Some courts consider this distinction crucial, concluding that anticipatory warrants violate the Fourth Amendment[9] or state statutes[10] and suppressing evidence gathered pursuant to them.[11] Likewise, defendants frequently challenge the evidence obtained pursuant to an anticipatory search warrant on constitutional grounds.[12] They argue that anticipatory search warrants are not issued on the belief that contraband is present at the specified location described in the affidavit.[13] Yet, a majority of courts conclude otherwise, permitting the State to use evidence gathered from the execution of anticipatory search warrants in its case-in-chief.[14] Although the Su-

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6. *See* Robert A. Messina, *Anticipatory Search Warrants: Striking a Balance Between Privacy Rights and Police Action*, 22 S. ILL. U. L.J. 391, 405 (1998).
7. *See* 2 LAFAVE, *supra* note 3, at 362.
8. *See id.* at 364.
9. The Fourth Amendment provides:
   > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

   U.S. CONST. amend. IV.
10. *See infra* Section III.B.
11. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (requiring the suppression of evidence gathered in violation of the Fourth Amendment).
12. *See* 2 LAFAVE, *supra* note 3, at 364.
13. *See id.*
14. *See* United States v. Hugoboom, 112 F.3d 1081, 1085 (10th Cir. 1997) (upholding the validity of an anticipatory warrant based on an affidavit indicating that a courier planned to deliver marijuana to a residence and that execution was contingent on delivery); United States v. Leidner, 99 F.3d 1423, 1426 (7th Cir. 1996), *cert. denied*, 520 U.S. 1169 (1997) (explaining that anticipatory search warrants are valid when they are based on probable cause that property will be located at a designated place at the time of the search); United States v. Becerra, 97 F.3d 669, 671 (2d Cir. 1996), *cert. denied*, 519 U.S. 1137 (1997) (affirming the validity of anticipatory warrants, even though the suspect left the premises with the package under surveillance prior to the execution of the

preme Court has not directly ruled on the issue, it would likely affirm the validity of anticipatory search warrants under the Fourth Amendment.[15]

In Maryland, the court of appeals has taken a stance seemingly out of tune with much of the country. In *Kostelec v. State*,[16] the court narrowly interpreted the language of section 551(a) of Article 27 of the Annotated Code of Maryland[17] and suppressed evidence gathered pursuant to an anticipatory warrant.[18] The court of appeals sent a message to the Maryland General Assembly that it must amend the law if anticipatory search warrants are to be valid under

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warrant); United States v. Ruddell, 71 F.3d 331, 333 (9th Cir. 1995) (observing that an anticipatory warrant is valid when contraband in the mail is on an irreversible course to a known destination); United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994) (holding that anticipatory warrants are valid when a court found probable cause after the package in question was delivered by mail and taken to the defendant's residence); United States v. Bieri, 21 F.3d 811, 814 (8th Cir. 1994) (upholding the validity of an anticipatory warrant when probable cause was based on an affidavit stating that a courier planned to deliver marijuana to a residence and the execution of the warrant was contingent on the delivery); United States v. Lawson, 999 F.2d 985, 987 (6th Cir. 1993) (affirming the constitutionality of an anticipatory warrant issued to search a package en route to a location where cocaine was present); United States v. Wylie, 919 F.2d 969, 974 (5th Cir. 1990) (holding that an anticipatory warrant is valid when a magistrate reasonably concluded that the defendant's home was the final destination for contraband discovered in the mail); United States v. Dornhofer, 859 F.2d 1195, 1198 (4th Cir. 1988) (explaining that an anticipatory warrant is valid when the contraband in question is on a course to a definite location) (citing United States v. Goodwin, 854 F.2d 33, 36 (4th Cir. 1988)).

15. *See infra* notes 290-99 and accompanying text.

16. 348 Md. 230, 703 A.2d 160 (1997).

17. MD. ANN. CODE art. 27, § 551(a) (1957 & Supp. 1996). The statute provides, in pertinent part: Whenever it be made to appear to any judge . . . by written application signed and sworn to by the applicant, accompanied by an affidavit . . . containing facts within the personal knowledge of the affiant . . . that there is probable cause, the basis of which shall be set forth in said affidavit . . . to believe that any misdemeanor or felony *is being committed* by any individual or in any building . . . or that any property subject to seizure under the criminal laws of the State *is situated or located* on the person of any such individual or in or on any such building . . . then the judge may forthwith issue a search warrant . . . . *Id.* (emphasis added). The *Kostelec* court interpreted the phrases "is being committed" and "is situated or located" literally—events giving rise to probable cause must be occurring as of the time when the affidavit for a search warrant is sworn. *See Kostelec*, 348 Md. at 236, 703 A.2d at 163.

18. *See Kostelec*, 348 Md. at 243, 703 A.2d at 166.

Maryland law.[19] If the Maryland General Assembly were to statutorily eliminate anticipatory search warrants, only constitutional grounds would remain for a defendant's challenge.[20]

This Comment examines the future of anticipatory search warrants on the state and federal level. In Part II, this Comment reviews the federal courts' treatment of anticipatory searches, discussing why such warrants have been upheld and why some courts have decided to strike them down.[21] In Part III, this Comment explores how various states have dealt with anticipatory search warrants.[22] In Part IV, this Comment traces the evolution of Maryland's treatment of anticipatory search warrants, how *Kostelec* affected that evolution, and the state's future handling of the issue.[23] In Part V, this Comment analyzes the Supreme Court's handling of similar Fourth Amendment issues and forecasts its opinion on the constitutionality of anticipatory search warrants.[24] In Part VI, this Comment examines why anticipatory search warrants are used and examines the debate between those who support anticipatory search warrants and those who do not.[25] Further, this Section focuses on the benefits and detriments of the use of anticipatory warrants by law enforcement personnel.[26] Finally, in Part VII, this Comment concludes that courts addressing the issue of anticipatory warrants must strike a delicate balance to account for the personal interests and rights guaranteed under Maryland and Federal Constitutional law.

II. ANTICIPATORY SEARCH WARRANTS IN FEDERAL COURTS

Prior to its change in 1990, Federal Rule of Criminal Procedure 41(a) authorized the issuance of a search warrant by certain judicial officers "within the district wherein the property or person sought is located."[27] In 1990, the words of limitation, "is located," were re-

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19. The *Kostelec* court's remarks suggest that for anticipatory warrants to be upheld in Maryland, section 551 must be amended to include the language "will be located." *See id.* at 236-37, 703 A.2d at 163.
20. *See id.* at 241, 703 A.2d at 165-66 (recognizing that anticipatory warrants raise potential Fourth Amendment concerns). The court did not address the constitutionality of anticipatory searches under the Fourth Amendment. *See id.*
21. *See supra* notes 27-130 and accompanying text.
22. *See supra* notes 131-211 and accompanying text.
23. *See supra* notes 212-86 and accompanying text.
24. *See supra* notes 287-99 and accompanying text.
25. *See supra* notes 300-21 and accompanying text.
26. *See supra* notes 322-32 and accompanying text.
27. *See* FED. R. CRIM. P. 41(a) (1989).

moved from the rule.[28] Rule 41(a)(1) now reads: "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) . . . for a search of property or for a person within the district."[29] The amendment of the rule removed the requirement that the items listed in an affidavit be at the specified location at the time the affidavit is sworn.[30] This change effectively validated anticipatory search warrants under the federal rules.[31]

Although the Supreme Court has never ruled directly on the issue of anticipatory search warrants,[32] it has laid out the standards on which probable cause for a search warrant is based.[33] The Fourth Amendment provides that no warrants shall be issued, but upon probable cause.[34] Therefore, a court may issue a warrant only if there is probable cause to believe that seizable evidence will be

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28. *See id.*

29. *Id.* Additionally, the advisory committee notes to the Federal Rules of Criminal Procedure provide: Rule 41(a)(1) permits anticipatory warrants by omitting the words "is located" which in the past required that in all instances the object of the search had to be located within the district at the time the warrant was issued. Now a search for property or a person within the district, or expected to be within the district, is valid if it otherwise complies with the rule. *Id.* (advisory committee note).

30. *See id.*

31. *See* Richard A. Powers, III, *Anticipatory Search Warrants: Future Probable Cause*, 28 CRIM. L. BULL. 59, 60-61 (1992) (discussing the effect of the 1990 amendments to Rule 41 on the validity of anticipatory warrants).

32. While not ruling directly on the issue, the Supreme Court has acknowledged in dicta that warrants can be anticipatory. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 102 (1979) (Rehnquist, J., dissenting) (noting that a warrant is by definition "an anticipatory authorization"); Dalia v. United States, 441 U.S. 238, 257 n.19 (1979) (finding that officers are not required to set forth the anticipated means for execution); United States v. Watson, 423 U.S. 411, 450 n.15 (1976) (Marshall, J., dissenting) (explaining that "a warrant based on anticipated facts is premature and void"). The Court has also implied the legality of anticipatory warrants by upholding the validity of wiretapping to collect evidence for arrest. *See* Berger v. New York, 388 U.S. 41, 50-52 (1967); *see also* James A. Adams, *Anticipatory Search Warrants: Constitutionality, Requirements, and Scope*, 79 KY. L.J. 681, 688-90 (1991) (discussing Supreme Court decisions that imply anticipatory warrants are valid).

33. *See* U.S. CONST. amend. IV; Katz v. United States, 389 U.S. 347, 352 (1967) (concluding that searches and seizures conducted without a warrant are per se unreasonable under the Fourth Amendment); CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 4.05 (3d ed. 1993) (discussing the probable cause standard for searches and seizures).

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

found on the premises or person to be searched.[35]

While a majority of federal courts have held that anticipatory search warrants are consistent with the Fourth Amendment,[36] a few cases are commonly cited by defendants that challenge the validity of such warrants.[37] In *United States v. Travisano*,[38] the United States Court of Appeals for the Second Circuit concluded that government agents had sufficiently established probable cause by demonstrating that a crime had been committed and that stolen property was located at the residence to be searched at the time of the warrant's issuance.[39] In *Travisano*, Connecticut police were investigating a shooting and robbery.[40] Within twenty-four hours of the crime, the police located a vehicle matching the description of the suspected getaway vehicle parked outside of a residence.[41] Securing a search warrant for the residence and automobile, law enforcement officials could not locate the instrumentalities of the crime; however, officials did find an unregistered firearm in the house and subsequently sought an indictment.[42] The court found sufficient probable cause to support the admission of the unregistered firearm, primarily relying on the location of the suspected getaway vehicle outside of the residence.[43] Although the court found that probable cause existed, the court's language, "probable cause to believe that evidence of such

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35. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 479 (1963) (observing that probable cause requires evidence that would warrant a reasonable person to believe a felony has been committed); Carroll v. United States, 267 U.S. 132, 162 (1925) (explaining that officers had probable cause to conduct a search and seizure of an automobile because "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient" to justify a search).

36. *See supra* note 14 and accompanying text.

37. *See, e.g.*, United States v. Travisano, 724 F.2d 341, 345 (2d Cir. 1983) (explaining that probable cause to search a residence requires a belief that evidence of a crime is located at that residence); United States v. Hendricks, 743 F.2d 653, 654 (9th Cir. 1984) (observing that at the time officers conduct a search, facts should exist to justify that the object of the search is present); United States v. Rundle, 327 F.2d 153, 163 (3d Cir. 1964) (concluding that "a search warrant is based upon a judicial determination of the present existence of justifying grounds—i.e., at the time of the issuance of the warrant").

38. 724 F.2d 341 (2d Cir. 1983).

39. *See id.* at 345.

40. *See id.* at 342-43.

41. *See id.* at 342.

42. *See id.*

43. *See id.* at 346-47.

crime *is* located,"[44] is often cited to support the proposition that a warrant is only valid if the evidence in question is present at the specified location at the time the warrant is sworn.[45]

In *United States v. Rundle*,[46] the United States Court of Appeals for the Third Circuit concluded that probable cause had not been established by a showing that legal materials required to perform future illegal activities were at a specified location.[47] Here, law enforcement officials conducted a warrant-based search of an illegal abortion clinic.[48] The affidavit underlying the warrant stated that materials to perform abortions were located at the address.[49] The court held that the possession of such materials alone—which by themselves were not illegal—was insufficient to create probable cause, because there was no demonstration that illegal behavior was presently occurring.[50] The *Rundle* court observed: "A search warrant is based upon a judicial determination of the present existence of justifying grounds—i.e., at the time of the issuance of the warrant."[51] Therefore, the court concluded that the illegally seized materials should not have been used as evidence in the defendant's conviction.[52]

In *United States v. Hendricks*,[53] the United States Court of Appeals for the Ninth Circuit likewise held that an anticipatory search warrant violated the Fourth Amendment.[54] In *Hendricks*, customs officials intercepted a package shipped from Brazil to Arizona.[55] Unlike other cases involving anticipatory warrants, the package was not mailed directly to the defendant's address.[56] The address on the package was for identification purposes only; the defendant had to

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44. *Id.* at 345 (emphasis added) (citing United States v. Harris, 403 U.S. 573, 584 (1971)).
45. *See* Gendron v. United States, 18 F.3d 955, 965 (1st Cir. 1994).
46. 327 F.2d 153 (3d Cir. 1964).
47. *See id.* at 160.
48. *See id.* at 155.
49. *See id.*
50. *See id* at 163.
51. *Id.* (quoting Mitchell v. United States, 258 F.2d 435, 436-37 (D.C. Cir. 1958) (Bazelon, J., concurring)).
52. *See id.* at 165. However, the defendant's conviction was not overturned because he failed to exhaust his State's available remedies before pursuing habeas corpus relief. *See id.*
53. 743 F.2d 653 (9th Cir. 1984).
54. *See id.* at 656.
55. *See id.* at 653.
56. *See id.*

personally pick up the package at the airport.[57] When inspected by customs officials, the package contained five to seven pounds of cocaine.[58] Despite the fact that the package was not to be delivered to the defendant's home, Drug Enforcement Agency personnel obtained a search warrant for his home.[59]

The *Hendricks* court held that the search warrant based on the contents of a package did not establish sufficient probable cause to support the issuance of a warrant to search the defendant's home.[60] The court further concluded that the magistrate issuing the warrant could not have reasonably concluded that the defendant would pick up the box and take it to his residence.[61] At the time the warrant was issued, the magistrate knew that the package was not at the defendant's home.[62] The United States Court of Appeals for the Ninth Circuit concluded that there was no showing of probable cause to support a conclusion that the package was at the listed address at the time of the issuance of the warrant[63] and that there was an insufficient nexus between the box and the residence.[64] The court explained: "The facts must be sufficient to justify a conclusion . . . that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued."[65]

Therefore, according to the *Travisano, Rundle,* and *Hendricks* courts, the Fourth Amendment requires that probable cause exist at

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57. *See id.*

58. *See id.* The court likened the officials' contact of the defendant to "a situation where police create the exigent circumstances and then use the existence of those exigencies to justify a search." *Id.* at 654 n.1 (citing United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980)).

59. *See id.* at 653-54.

60. *See id.* at 655. The court observed that a telephonic warrant—issued as the events giving rise to probable cause occurred—was a preferable substitute for the anticipatory warrant. *See id.* at 655 n.2.

61. *See id.* at 655.

62. *See id.* at 654.

63. *See id.* at 655. Although the court did recognize that other courts applied the "on a sure course" test, it concluded that no probable cause existed because Hendricks had not even attempted to pick up the box (which would not have been delivered to his address by the carrier) at the time of the warrant's issuance. *See id.*

64. *See id.* However, the court refused to apply the exclusionary rule because the officer's reliance was not unreasonable under *United States v. Leon,* 468 U.S. 897 (1984). *See id.* at 656. For a discussion of *Leon,* see *infra* notes 263-64 and accompanying text.

65. *Id.* (quoting Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968)).

the time of the issuance of the warrant.[66] Otherwise, the search is unreasonable and any evidence gathered will be suppressed at the subsequent trial.[67] However, several other federal courts conclude differently by concentrating on whether sufficient information exists to support a warrant before the contraband or other evidence of a crime is at a particular location.

A. *The "On a Sure Course" Test*

Notwithstanding *Travisano*, *Rundle*, and *Hendricks*, federal courts often uphold anticipatory warrants that involve a controlled delivery of contraband that is "on a sure course to its destination" through the mail.[68] In *United States v. Dornhofer*,[69] the United States Court of

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66. *Compare* United States v. Travisano, 724 F.2d 341, 345 (2d Cir. 1983) (concluding that agents had established probable cause prior to entering the defendant's residence, and therefore refusing to suppress the evidence that was seized), *with* United States v. Rundle, 327 F.2d 153, 160 (3d Cir. 1964) (suppressing evidence seized from an abortion clinic where the officers who had obtained the warrant had no grounds to believe illegal contraband would be found), *and Hendricks*, 743 F.2d at 656 (invalidating a search warrant for a home that was not based on facts establishing probable cause that evidence of a crime would be on the premises at the time the warrant was issued).

67. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

68. *See* United States v. Dornhofer, 859 F.2d 1195, 1198 (4th Cir. 1988) (relying on the "sure course" of a package containing child pornography to uphold the validity of an anticipatory warrant contingent on law enforcement's mailing of the package to the original address); *see also* United States v. Becerra, 97 F.3d 669, 671 (2d Cir. 1996) (affirming the defendant's drug conviction based on evidence gathered during a search supported by an anticipatory warrant and executed via a controlled delivery) (citing United States v. Garcia, 882 F.2d 699, 702 (2d Cir. 1989)); United States v. Ruddell, 71 F.3d 331, 333-34 (9th Cir. 1995) (holding that a postal inspector's controlled delivery of contraband videotape complied with the "on a sure course" test); United States v. Jackson, 55 F.3d 1219, 1223-24 (6th Cir. 1995) (holding that probable cause to search for evidence of drug trafficking had been established when law enforcement officials conducted a controlled delivery of a package of heroin and the package was accepted, even though a suspect subsequently fled from the residence with the package); United States v. Gendron, 18 F.3d 955, 965-67 (1st Cir. 1994) (holding that a package containing a videotape of child pornography, which was delivered to the address on the package and taken into the residence, established probable cause that evidence of a crime would be located in the house); United States v. Tagbering, 985 F.2d 946, 949-51 (8th Cir. 1993) (holding that a package of hashish and marijuana placed in the mail for controlled delivery to the address on the package, and received into the residence by the addressee, established probable cause); United States v. Lowe, 575 F.2d 1193, 1194 (6th Cir. 1978) ("[C]ontraband does not have to be presently located at the place described in the warrant if there is probable

Appeals for the Fourth Circuit conducted a representative analysis under this test. Here, law enforcement officials conducted a sting operation to detect buyers of child pornography.[70] When the defendant accepted the sting operation's mailed offer, law enforcement officials obtained an anticipatory warrant for his house, conditioned on the placement of the materials in the mail.[71] Observing the defendant retrieve the pornography from his mailbox and return to his residence, law enforcement officials conducted a search of the defendant's house.[72] The court noted that an article must be "on a sure course" to its destination to create a constitutionally valid anticipatory search warrant.[73] The court upheld the trial court's admission of the evidence gathered during the search because law enforcement officials fulfilled the condition in the warrant—the package was placed in the mail and delivered to the defendant.[74] In making this conclusion, the court relied on the high level of certainty that an item will be delivered to the exact address provided to the postal service or a parcel post service.[75]

In *United States v. Gendron*,[76] the First Circuit Court of Appeals further refined the "on a sure course" test by discussing the particularity of the "triggering event," or condition precedent to the execution of an anticipatory warrant.[77] In *Gendron*, a man ordered child pornography from a company that, unbeknownst to him, was part of a government sting operation.[78] Law enforcement agents sent the defendant the videotape that he had ordered and obtained a search warrant for his home to be executed on the tape's arrival.[79] The videotape was delivered, the search was executed, and the tape was

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cause to believe that it will be there when the search warrant is executed.").

69. 859 F.2d 1195 (4th Cir. 1988).
70. *See id.* at 1197.
71. *See id.*
72. *See id.*
73. *See id.* at 1198. The court remarked that it had "adopted" the analysis of the Ninth Circuit in *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986). *See id.* However, the *Hale* court actually applied a very expansive version of this test. *See infra* notes 105-13 and accompanying text.
74. *See Dornhofer*, 859 F.2d at 1198.
75. *See id.*; United States v. Lowe, 575 F.2d 1193, 1195 (6th Cir. 1978).
76. 18 F.3d 955 (1st Cir. 1994).
77. *See id.* at 967 (holding that a search warrant issued for a contraband videotape addressed to and received at the place to be searched is consistent with the Fourth Amendment).
78. *See id.* at 957.
79. *See id.* at 970.

seized as evidence.[80] The defendant argued that the government's search warrant was defective because it did not adequately specify when the warrant would take effect.[81]

The court in *Gendron* concluded that the simple "fact that a warrant is 'anticipatory' . . . does not invalidate a warrant or make it somehow suspect or legally disfavored."[82] The court also noted that the Constitution does not impose the requirement that warrants take effect upon issuance; rather the Constitution requires that they are not unreasonable and that they are supported by probable cause.[83] The court further explained that there was nothing unreasonable about authorizing a search for a future date when reliable information indicates that contraband will reach a specified location some time in the future.[84]

The *Gendron* court noted that in principle, the use of some "triggering event," contraband being delivered to a certain location to determine when a warrant will go into effect, can help assure that the search takes place only when justified by " 'probable cause.' "[85] The court concluded that anticipatory warrants may thus increase, rather than decrease, the protection against unreasonable intrusions into a citizen's privacy.[86]

Several courts have also applied a loose interpretation of the "particularity requirement" of the Fourth Amendment[87] for antici-

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80. *See id.*

81. *See id.* at 965.

82. *Id.*

83. *See id.*

84. *See id.*; United States v. Hugoboom, 112 F.3d 1081, 1085 (10th Cir. 1997) (concluding that a warrant that will only become effective upon the happening of some future event is not unconstitutional per se).

85. Gendron, 18 F.3d at 965.

86. *See id.*; *see also* 2 LAFAVE, *supra* note 3, § 3.7(c), at 97. Professor LaFave observed:

> [A]s a general proposition the facts put forward to justify issuance of an anticipatory warrant are more likely to establish that probable cause will exist at the time of the search than the typical warrant based solely upon the known prior location of the items to be seized at the place to be searched.

Id.

87. *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (discussing the purpose of the Fourth Amendment's particularity requirement as a protection against "[a] general, exploratory rummaging in a person's belongings"); Stanford v. Texas, 379 U.S. 476, 484 (1965) (discussing the particularity requirement as it relates to things to be seized by law enforcement officers and noting that "[a]s to what is to be taken, nothing is left to the discretion of the

patory warrants.[88] In *United States v. Dennis*,[89] the United States Court of Appeals for the Seventh Circuit considered the sufficiency of the conditions precedent to the execution of an anticipatory warrant[90] and of the nexus between the package, defendants, and residence to be searched.[91] Determining that a package matched a "drug package profile" and conducting a drug dog sniff, a postal inspector opened a package to discover that it contained cocaine.[92] The postal inspector then sealed the package with an electronic beeper enclosed in the package and sought an anticipatory warrant to search

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officer executing the warrant" (quoting Marron v. United States, 275 U.S. 192, 196 (1927))); Boyd v. United States, 116 U.S. 616, 624-27 (1886) (explaining that the particularity requirement of the Fourth Amendment prevents government officials from initiating broad, unfounded searches of citizens homes); *see also* Larry EchoHawk & Paul EchoHawk, *Curing a Search Warrant that Fails to Particularly Describe the Place to be Searched*, 35 IDAHO L. REV. 1, 3 (1998) (explaining that when assessing a particularity challenge "the ultimate inquiry is always whether the terms of the warrant limited the discretion of the officer executing the warrant").

88. *See* United States v. Hotal, 143 F.2d 1223, 1227 (9th Cir. 1998) ("We conclude only that the necessary conditions [precedent] must appear in the court-issued warrant and attachments that those executing the search maintain in their immediate possession in order to guide their actions and to provide information to the person whose property is being searched."); United States v. Dennis, 115 F.3d 524, 528 (7th Cir. 1997) (finding the conditions precedent to execution of the anticipatory warrant had been adequately stated in the warrant's accompanying affidavit); *Hugoboom*, 112 F.3d at 1085-86 (upholding the validity of an anticipatory warrant as the conditions precedent to its execution were adequately set forth on the warrant's face).

89. 115 F.3d 524 (7th Cir. 1997).

90. *See id.* at 528-29.

91. *See id.* at 529-31. In its consideration of the nexus between the package, the defendants, and the residence to be searched, the court recognized the presence of at least two alternatives—the "on a sure course" test and the *Garcia* test—to establishing probable cause. *See id.* at 530. Although the court noted that several jurisdictions held that placing contraband in the mail to an address satisfied the "on a sure course" test, *see id.* at 530 (citing United States v. Dornhofer, 859 F.2d 1195, 1198 (4th Cir. 1988); United States v. Goodwin, 854 F.2d 33, 36 (4th Cir. 1988); United States v. Hale, 784 F.2d 1465, 1468-69 (9th Cir. 1986)), it held that the *Garcia* test would also be satisfied. *See id.* at 530-31. For this conclusion, the court relied on the postal inspector's experience in profiling, the excessive quantity of cocaine (which negated any possibility that the product was sent on a whim), and the defendant's connections to previous drug trafficking activities. *See id.* For a discussion of the *Garcia* test, see *infra* notes 114-30 and accompanying text.

92. *See Dennis*, 115 F.3d at 527.

the defendant's residence at the listed address.[93] The sole condition precedent was established in the affidavit, not in the actual warrant underlying the search.[94]

In his subsequent challenge to the evidence gathered during the controlled delivery, the defendant argued that the warrant was facially void because it failed to provide the conditions precedent to the search.[95] Even though the affidavit was not attached to the warrant, the court nonetheless held that the affidavit sufficiently set forth the conditions precedent to the search.[96] The court concluded:

> The face of the warrant stated that execution of the warrant was subject to the conditions stated in the affidavit. This evidences that the issuing judge read and considered the affidavit in issuing the warrant. The record also establishes that the officers complied with the conditions precedent in executing the warrant.[97]

In *United States v. Hugoboom*,[98] the United States Court of Appeals for the Tenth Circuit echoed the sentiments of the *Dennis* court by refusing to suppress evidence gathered pursuant to a warrant that did not explicitly set forth all conditions precedent to the search.[99] Much like in *Dennis*, the postal inspector involved in *Hugoboom* noticed that a package matched a drug profile and ordered a drug dog sniff.[100] Conducting a controlled delivery, law enforcement officials searched the house and arrested the defend-

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93. *See id.*

94. As issued by the magistrate and incorporated by the actual warrant, the affidavit requested permission to search each floor of the two-story residence only if an occupant of that floor opened the package. *See id.* at 528. Therefore, only if the resident of the first floor accepted or opened the package could law enforcement personnel search the first floor. *See id.*

95. *See id.*

96. *See id.* at 529. In support, the *Dennis* court relied on *United States v. Moetamedi*, 46 F.3d 225 (2d Cir. 1995), where the court concluded: "[A]n anticipatory warrant need not state on its face the conditions precedent for its execution if the warrant affidavit contains 'clear, explicit, and narrowly drawn' conditions and the executing officers actually satisfy those conditions before executing the warrant." *Id.* (quoting *Moetamedi*, 46 F.3d at 229).

97. *Id.* (footnote omitted).

98. 112 F.3d 1081 (10th Cir. 1997).

99. *See id.* at 1085-86.

100. *See id.* at 1083.

ant.[101] In response to the defendant's argument that the warrant was defective because it did not specify the conditions precedent to the warrant, the court noted:

> Many, if not most, search warrants are effective upon issuance and may be executed immediately thereafter. However, an anticipatory warrant. . .is not unconstitutional per se and is, indeed, no stranger to the law. Such warrants have repeatedly been upheld, assuming probable cause and 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.[102]

Concluding that the package was "on a sure course" to the defendant's residence, the court affirmed the defendant's conviction and refused to overturn the lower court's denial of the motion to suppress.[103]

Although the "on a sure course" test has served as a starting point for determining the validity of anticipatory warrants, some federal circuits have loosely interpreted the test's parameters.[104] As demonstrated by the United States Court of Appeals for the Ninth Circuit's decision in *United States v. Hale*,[105] some federal courts have significantly relaxed the requirements of the test. In *Hale*, customs officials notified the defendant that a shipment of sexually explicit material had been intercepted and confiscated.[106] Hale chose not to respond to this notification and did not attempt to receive the illegal material.[107] Customs inspectors then confiscated the remainder of Hale's order when it arrived in the country in four separate enve-

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101. *See id.* at 1083-84.

102. *Id.* at 1085 (emphasis added).

103. *See id.* at 1087.

104. *See* United States v. Becerra, 97 F.3d 669, 671 (2d Cir. 1996) (concluding that the search of a residence pursuant to an anticipatory warrant was valid even though the contraband was removed from the address on which the warrant was based prior to the execution of the warrant); United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994)(holding an anticipatory warrant to be valid even though the warrant did not state the exact time at which the controlled delivery of the package was to take place).

105. 784 F.2d 1465 (9th Cir. 1986), *overruled on other grounds by* United States v. Weber, 923 F.2d 1338 (9th Cir. 1990).

106. *See id.* at 1467. The shipment was part of an order he had placed with a Netherlands distributor. *See id.*

107. *See id.*

lopes.[108] Rather than notifying Hale of these actions, customs agents sought a warrant for Hale's residence based on their intention "to have the previously described envelopes delivered as addressed by an employee of the United States Postal Service."[109] A controlled delivery of the pornography was made to Hale's residence and he was subsequently arrested.[110]

Hale challenged the validity of the search warrant for his home on the grounds that it was anticipatory in nature.[111] The court held that the "on a sure course" test had been satisfied because the contraband on which the warrant was based was originally addressed to Hale's residence for delivery.[112] Although the court reasoned that customs officials had not interfered with the destination of Hale's mail, customs officials did have control over whether or not the contraband was actually delivered.[113] It is clear that customs agents initially intercepted Hale's pornographic material so that it would not be delivered, but subsequently had it delivered to justify a search of Hale's residence for other evidence of criminality. In doing so, customs officials manipulated the delivery of contraband to serve their own purposes, thus distorting the underlying purposes of the "on a sure course" test.

B. An Alternative Analysis—The Garcia *Test*

However, not all federal courts have applied the "on a sure course" test when confronted with the constitutional validity of anticipatory warrants. In *United States v. Garcia*,[114] the United States Court of Appeals for the Second Circuit upheld an anticipatory search warrant, without determining whether the evidence was on a "sure course to a known destination."[115] Instead, the *Garcia* court focused on independent evidence demonstrating probable cause.[116] Although recognizing that other courts predicate anticipatory warrants on a search for contraband that "is on a sure course to its des-

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108. *See id.*
109. *Id.*
110. *See id.* at 1468.
111. *See id.*
112. *See id.* at 1469.
113. *See id.* at 1470.
114. 882 F.2d 699 (2d Cir. 1989).
115. *Id.* at 703-04. In fact, the contraband was in two duffel bags which were being carried by drug couriers. *See id.* at 700-01. After customs agents discovered drugs in the bags, the couriers gave up the defendant and agreed to make a controlled delivery. *See id.*
116. *See id.* at 703.

tination," the *Garcia* court listed criteria for determining whether an anticipatory warrant establishes probable cause in the place of the "on a sure course" test.[117] In *Garcia,* United States servicemen stationed in Panama smuggled cocaine into the United States.[118] Intercepted by customs officials in Miami,[119] the two servicemen were flown to New York, where they agreed to cooperate with law enforcement officials and complete the delivery of the cocaine to other members of the smuggling operation.[120] Police obtained an anticipatory warrant for the home to which the servicemen were to deliver the cocaine.[121]

Unlike the frequent scenarios in which anticipatory warrants are utilized, authorities did not mail the contraband; instead, they played a direct role in determining how and when the contraband reached the final destination, much like the scenario addressed by the *Hale* court.[122] Furthermore, the court concluded that "delivery," as required by the anticipatory warrant, had been made at the time of the execution of the warrant, even though the package had not been received by the defendant.[123] The ability of law enforcement officials to direct the transportation of the contraband in *Garcia* is quite different than the usual scenarios where the "on a sure course" test is applied—controlled deliveries to a specific individual at a specific address.[124]

Rather than applying the "on a sure course" test, the *Garcia* court required magistrates to seek "independent evidence giving rise to probable cause that the contraband will be located at the

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117. *Id.* at 702-04.

118. *See id.* at 700-01.

119. *See id.* at 700.

120. *See id.* at 701. Participants in the smuggling scheme usually delivered the cocaine to one of three other participants: Gabriel Grant, Celina Wilson-Grant, or Francisca Caballero. *See id.* at 700.

121. *See id.* As a defendant, Wilson-Grant argued that the anticipatory warrant was executed prematurely because the agents conducted the search before she took possession of the cocaine. *See id.* at 704. The court rejected this argument, concluding that the delivery occurred when the servicemen entered the apartment and placed the bags containing the cocaine on the floor. *See id.*

122. *See id.* For a discussion of *United States v. Hale,* see *supra* notes 105-13 and accompanying text.

123. *See Garcia,* 882 F.2d at 701. The servicemen were allowed in the apartment by the husband of one of the defendants. *See id.* They waited 10 minutes for someone to take possession of the bag. *See id.* No one did, but the DEA agents entered, announced they had a search warrant, and searched the apartment. *See id.*

124. *See supra* note 68 and accompanying text.

premises at the time of the search."[125] Moreover, according to the *Garcia* court, the affidavit underlying a warrant "must show, not only that the [government] agent believes a delivery of contraband is going to occur, but also how [the agent] obtained this belief, how reliable his sources are, and what part government agents will play in the delivery."[126] Furthermore, the court warned that when an anticipatory warrant is issued, "the magistrate should protect against its premature execution by listing in the warrant conditions governing its execution which are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents."[127]

Applying this analytical framework, the *Garcia* court concluded that the anticipatory warrant was supported by probable cause.[128] The court found that the delivery fulfilled the clear conditions precedent of the warrant because the warrant specifically hinged on delivery *by* one of the serviceman, rather than delivery *to* a specific individual, such as any of the defendants.[129] Unlike the relatively clear contours of the "on a sure course" test, the *Garcia* court applied a more amorphous, flexible standard—much like the current standard for probable cause as dictated in *Illinois v. Gates*.[130]

III. ANTICIPATORY SEARCH WARRANTS IN STATE COURTS

A. *Jurisdictions Supporting the Use of Anticipatory Search Warrants*

In line with the trend in the federal circuits,[131] several state courts have upheld the use of anticipatory search warrants.[132] For

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125. *Garcia*, 882 F.2d at 703.
126. *Id.*
127. *Id.* at 703-04.
128. *See id.* at 704.
129. *See id.*
130. 462 U.S. 213, 230-31 (1983).
131. *See supra* Part II.
132. *See* Johnson v. State, 617 P.2d 1117, 1124-25 n.11 (Alaska 1980) (observing that the better practice for issuing an anticipatory warrant would be for a judge to "insert a direction in the search warrant making execution contingent on the happening of an event which evidences probable cause that the item to be seized is in the place to be searched"); State v. Cox, 522 P.2d 29, 34 (Ariz. 1974) (analyzing the validity of an anticipatory warrant based on information that a car carrying marijuana would be entering the country); People v. Souza, 22 Cal. Rptr. 2d 264, 269-70 (Cal. Ct. App. 1993) (discussing the validity of an anticipatory warrant that was based on an individual's expectation of meeting a party to conduct a drug transaction); Bernie v. State, 524 So. 2d 988, 991 (Fla. 1988) (concluding that information concerning the future transport of drugs can be used to obtain an anticipatory search warrant); State v. Baker, 453 S.E.2d 115, 117 (Ga. Ct. App. 1995) (upholding the notion

example, in *Alvidres v. Superior Court*,[133] California addressed the issue of anticipatory search warrants. Here, federal authorities inter-

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that anticipatory search warrants are not per se illegal); State v. Wright, 772 P.2d 250, 256 (Idaho Ct. App. 1989) ("Where there is no present possession the supporting evidence for the prospective warrant must 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 . . .") (quoting People v. Glen, 282 N.E.2d 614, 617 (1972))); People v. Favela, 681 N.E.2d 582, 584-85 (Ill. App. Ct. 1997) (discussing the amendment of a state statute to allow the issuance of anticipatory search warrants), *appeal denied*, 689 N.E.2d 1142 (Ill. 1997); Russell v. State, 395 N.E.2d 791, 798-800 (Ind. Ct. App. 1979) (observing that a state statute did not prohibit the issuance of a warrant based on probable cause to believe evidence of a crime will be at a specific location at a future time); Commonwealth v. Soares, 424 N.E.2d 221, 224-25 (Mass. 1981) (noting that a state statute permitted the issuance of a search warrant based upon a showing that concealment or possession is probable at the time the warrant is to be executed); People v. Brake, 527 N.W.2d 56, 60 (Mich. Ct. App. 1994) ("[W]hen the affidavit shows that an identified individual has received, or anticipates receiving, specific contraband through the mail at a particular location, there is probable cause to believe that other contraband or evidence of the crime will be found at that location."); State v. Stott, 503 N.W.2d 822, 829 (Neb. 1993) (basing a search warrant on information regarding a future date on which the defendant would receive more marijuana); State v. Parent, 867 P.2d 1143, 1145-46 (Nev. 1994) (discussing a search warrant based on information that a future flight would enter the jurisdiction carrying cocaine); State v. Canelo, 653 A.2d 1097, 1101 (N.H. 1995) (observing that anticipatory search warrants do not per se violate the Fourth Amendment); State v. Ulrich, 628 A.2d 368, 371-72 (N.J. Super. Ct. App. Div. 1993) (upholding the validity of a warrant "to be executed only if and when the specifically described event which gives rise to probable cause actually occurs"); *Glen*, 282 N.E.2d at 617 (explaining that a state law requirement that search warrants be executed "forthwith" did not bar the use of anticipatory warrants, noting that "the ultimate answer to the problem is that as long as the evidence creates a substantial probability that the seizable property will be on the premises when searched, the warrant should be sustained"); State v. Wahl, 450 N.W.2d 710, 715-16 (N.D. 1990) (discussing the trustworthiness of an affidavit detailing circumstances of a controlled buy of drugs); State v. Folk, 599 N.E.2d 334, 337-38 (Ohio Ct. App. 1991) (concluding that there is no probable cause defect "as long as the evidence creates substantial probability that the seizable property will be on the premises when searched" (quoting *Glen*, 282 N.E.2d at 617)); Commonwealth v. DiGiovanni, 630 A.2d 42, 46-47 (Pa. Super. Ct. 1993) (holding that the facts established a reasonable basis to conclude that there was a fair probability that evidence of a crime or contraband would arrive on the premises prior to any search); *see also* Messina, *supra* note 6, at 396-97 (discussing the development of the law of anticipatory search warrants).

133. 90 Cal. Rptr. 682 (Cal. Ct. App. 1970).

cepted a package addressed to the defendant's residence.[134] Finding marijuana within the package, law enforcement officers obtained an anticipatory warrant for Alvidres's address based on the knowledge that the post office would deliver the package.[135] Upon delivery, the police executed the warrant and arrested Alvidres.[136] The defendant argued that the affidavit sworn for the search of his home was void because it clearly demonstrated that there was no basis on which the court could conclude that the contraband was presently on the premises.[137]

The court upheld the validity of anticipatory warrants, observing that 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."[138] The court also emphasized that "[o]ne of the major difficulties which confronts law enforcement in the attempt to comply with court-enunciated requirements for a 'reasonable' search and seizure is the time that is consumed in obtaining warrants."[139] Rather than striking the anticipatory warrants as violative of the Fourth Amendment, the court went so far as to "commend the participants in this procedure for their thoroughness, imagination and scrupulous compliance with the law."[140]

In *People v. Glen*,[141] the Court of Appeals of New York issued a similarly positive endorsement of anticipatory warrants.[142] An affidavit supporting an anticipatory search warrant averred that a package containing narcotics consigned to the defendant, a known drug dealer, was due to arrive at a local bus station.[143] After the arrival of

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134. *See id.* at 683.

135. *See id.* at 684.

136. *See id.*

137. *See id.*

138. *Id.* at 685. The court noted that the time frame between the issuance of the warrant and its execution was so narrow that the court could evade the issue of anticipatory warrants altogether. *See id.* at 684. The court concluded that the warrant was valid regardless of whether it was issued before the drugs reached the residence or after they had reached the residence. *See id.*

139. *Id.* at 685.

140. *Id.* at 687.

141. 282 N.E.2d 614 (N.Y. 1972).

142. *See id.* at 617 (describing police use of anticipatory warrants as "laudable").

143. *See id.* at 616. The *Glen* court actually considered two, unrelated convictions on the appeal. *See id.* at 615. Although only the facts underlying the conviction of J. Christopher Glen are discussed here, those underlying the conviction of the other defendant are somewhat similar. *See id.* at 615-16.

the package, the police examined its contents.[144] Observing that the package contained marijuana, the police placed it under surveillance.[145] On the following afternoon, Glen arrived at the bus station, picked up the package, and was subsequently arrested.[146]

The defendant challenged the validity of the search warrant on the grounds that "a necessary condition precedent to the issuance of a search warrant is the present unlawful possession of seizable property on the person or at the place designated in the warrant."[147] The court not only upheld the validity of the search warrant, but further concluded that anticipatory warrants may be more reliable than traditional warrants because they predict where contraband will be at a given time.[148]

The Supreme Court of Alaska also upheld a conviction based on evidence gathered pursuant to an anticipatory search warrant issued in *Johnson v. State*.[149] Here, an informant notified the police that a shipment of drugs was to be delivered to a local airport and then transported to the defendant's home.[150] An anticipatory search warrant was issued and two police officers were dispatched to the airport to observe the delivery of the package.[151] Observing two individuals accept the package, the officers followed them to the defendant's home and subsequently executed the search warrant obtained in anticipation of the package's delivery.[152] During an in-

144. *See id.* at 616.

145. *See id.*

146. *See id.*

147. *Id.*

148. *See id.* at 617. The court reasoned:

> At best, present possession is only probative of the likelihood of future possession. In cases [involving anticipatory search warrants] the certainty of future possession is greater or is often greater than that based on information of past and presumably current possession . . . . [I]n many kinds of organized crime the evidence supplied to obtain warrants does not relate to current crimes but past crimes with circumstances showing the likelihood of continuance of the same activity. In the present cases, the evidence that there would be a consummated prospective crime was logically and probatively stronger. The necessary pieces were in motion and all but inevitably the pieces would fall into a set, at a later time, constituting the crime.

Id. at 617-18.

149. 617 P.2d 1117 (Alaska 1980).

150. *See id.* at 1120.

151. *See id.* at 1122.

152. *See id.*

spection of the package and the defendant's home, the police found a large quantity of cocaine and heroin.[153]

The defendant challenged the validity of the search warrant based on the inability of an affiant to positively identify the location of the contraband for an anticipatory search warrant.[154] The court rejected this argument, explaining that anticipatory warrants based on probable cause are "constitutionally permissible 'as long as the evidence creates a substantial probability that the seizable property will be on the premises when searched.' "[155]

In *Commonwealth v. Soares*,[156] the Supreme Judicial Court for Massachusetts also affirmed the conviction of a defendant based on evidence garnered pursuant to an anticipatory warrant.[157] A California parcel service clerk became suspicious of a customer's behavior when he dropped off a package.[158] Based on her authority and UPS regulations, the clerk checked the contents of the package and discovered that it contained a cellophane bag of white powder.[159] The employee notified her supervisor who, in turn, contacted California state police to take control of the package.[160] A California detective determined that the powdery substance was methamphetamine.[161] California law enforcement officials contacted the Massachusetts state police and informed them of the package's contents and the specific delivery address.[162] The narcotics were then repackaged and delivered to Massachusetts.[163] The Massachusetts state police obtained an anticipatory search warrant for the address listed on the package and on delivery of the package, executed the warrant.[164]

The defendant sought to suppress all evidence recovered from the home on the grounds that the anticipatory search warrant was

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153. *See id.*
154. *See id.* at 1125.
155. *Id.* (quoting People v. Glen, 282 N.E.2d 614, 617 (N.Y. 1972)). The court also noted that anticipatory search warrants complied with a state statute that only required a reasonable belief that evidence will be located at a stated place at the time of execution of the warrant. *See id.* at 1124 (citing ALASKA STAT. § 12.35.020(3) (Michie 1990)).
156. 424 N.E.2d 221 (Mass. 1981).
157. *See id.* at 225.
158. *See id.* at 223.
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*

based on evidence that was not on the premises at the time of the warrant's issuance.[165] Therefore, the defendant argued, the warrant violated state law.[166] The court rejected the defendant's literal reading of the statute and explained that the essential question under the state statute, as under the Fourth Amendment, is "whether 'the evidence [stated in the affidavit] creates substantial probability that the seizable property will be on the premises when searched.' "[167] The court observed that the defendant's narrow interpretation would not effectuate the purposes underlying the use of anticipatory warrants, all of which were consistent with the Fourth Amendment and the state statute.[168]

B. Jurisdictions Suppressing Evidence Gathered Pursuant to Anticipatory Search Warrants

Not all courts interpreting state statutes resembling the Fourth Amendment have concluded that anticipatory warrants are consistent with state law.[169] While several states have upheld the validity of anticipatory search warrants,[170] a few states have prohibited their

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165. *See id.* at 224 (discussing MASS. GEN. LAWS ANN. ch. 276, § 1 (West 1980)). The court describes the statute as providing that "warrants may [be] issue[d] in criminal cases on a showing of probable cause to believe that defined property or articles, including 'property or articles the possession or control of which is unlawful, are concealed' in the place to be searched." *Id.* at 225.

166. *See id.*

167. *Id.* (quoting People v. Glen, 282 N.E.2d 614, 617 (N.Y. 1972)).

168. *See id.* at 224-25. For a discussion of the public policy initiatives underlying the use of anticipatory warrants, see *infra* Section VI.A.

169. This is because of the federal structure of the American system of government. A citizen's first line of protection is found in the Fourth Amendment to the United States Constitution. For the text of the Fourth Amendment, see *supra* note 9. A second line of protection for citizens against unreasonable searches and seizures resides in the case law interpreting the Fourth Amendment. *See* Katz v. United States, 389 U.S. 347, 352 (1967) (concluding that searches and seizures conducted without a warrant are per se unreasonable under the Fourth Amendment); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of a defendant's constitutional rights must be suppressed from the government's case-in-chief). In addition to the United States Constitution and its case law, citizens enjoy the additional protection of their respective state statutes that address search and seizure issues and probable cause requirements. *See infra* notes 176-211 and accompanying text. While states must at a minimum comply with the standards set forth in the United States Constitution, they are free to require even more stringent probable cause requirements for legal searches and seizures. *See* discussion *infra* Parts IV.A., V.

170. *See supra* note 132 and accompanying text.

use.[171] In most cases, these states have done so because language in their statutes prohibit the issuance of anticipatory warrants.[172] For example, in *Ex Parte Oswalt*,[173] the Supreme Court of Alabama held that anticipatory search warrants were inconsistent with the Alabama Rules of Criminal Procedure.[174] In *Ex Parte Oswalt*, a police officer obtained an anticipatory warrant for the defendant's home based on the knowledge that an undercover policeman would sell drugs to Oswalt at that location.[175]

The court in *Ex Parte Oswalt* considered the language of Rule 3.8 of the Alabama Rules of Criminal Procedure, which uses both present and past tense in authorizing search warrants.[176] The court determined that the phrases "[w]as unlawfully obtained, . . . [w]as used as the means of committing any offense, . . . is in the possession of any person, [and] constitutes evidence of a criminal offense" required that there be probable cause to believe that the cocaine was located at Oswalt's premises at the time of the warrant's issuance.[177] The court also relied on a statute predating the rule that required the evidence to be presently in the possession of the

171. *See infra* note 172 and accompanying text.

172. *See* Ex Parte Oswalt, 686 So. 2d 368, 373 (Ala. 1996) (construing an Alabama Rule of Criminal Procedure which, based on a predecessor statute, authorized search warrants if contraband was in the possession of the person or place to be searched); People v. Poirez, 904 P.2d 880, 882-83 (Colo. 1995) (construing a Colorado statute to imply that contraband must be at or on the location to be searched before a warrant is issued); Bernie v. State, 524 So. 2d 988, 992 (Fla. 1988) (per curiam) (concluding that an amendment to the state constitution lifted the ban on anticipatory search warrants); People v. Ross, 659 N.E.2d 1319, 1321-22 (Ill. 1991) (finding that a state statute required present probable cause that a crime had been committed and further commenting that the legislature should determine whether the use of anticipatory warrants should be allowed); State v. Gillespie, 530 N.W.2d 446, 448 (Iowa 1995) (construing a state statute to require that probable cause exist when a warrant is issued, not at some future time); Kostelec v. State, 348 Md. 230, 236-37, 703 A.2d 160, 163 (1997) (holding that anticipatory search warrants are inconsistent with a state statute governing probable cause for the issuance of a warrant).

173. 686 So. 2d 368 (Ala. 1996).

174. *See id.* at 372-73. While the State focused on whether anticipatory warrants are per se unconstitutional, the court's analysis centered on whether "the specific anticipatory search warrant in this case was authorized by Rule 3.8." *Id.* The court conceded that anticipatory warrants are not per se unconstitutional. *See id.*

175. *See id.* at 370.

176. *See id.* at 373.

177. *Id.* at 373-74.

person whose premises are to be searched.[178] As a result of the court's literal interpretation of the statute, the anticipatory search warrant for Oswalt's residence was held to be void.[179]

In *People v. Poirez*,[180] a Colorado court similarly interpreted a state statute[181] to prohibit the use of anticipatory search warrants.[182] Here, the police obtained a search warrant for the defendant's home because a package containing marijuana was to be delivered.[183] When the marijuana was delivered, police executed the warrant and arrested the defendant, Anthony Poirez, even though the package was addressed to Brett Johnson.[184]

Like *Ex Parte Oswalt*,[185] the *Poirez* court held that anticipatory search warrants were inconsistent with the state's search and seizure statute.[186] The court observed that the language of the statute "creates a barrier to the issuance of anticipatory warrants by judicial officers."[187] Like the Alabama provision involved in *Ex Parte Oswalt*, the state statute required that the object of the search be present at the designated location at the time the warrant was issued.[188] Moreover, the Colorado statute retained the language of the pre-1990 Federal Rule of Criminal Procedure 41(a) that prohibited anticipatory warrants.[189] The court noted that it was the 1990 amendment to Federal Rule of Criminal Procedure 41(a) that allowed anticipatory warrants.[190] Therefore, because the state legislature had retained the

178. *See id.* at 373. The court explained that the legislature had expressed no intention "to allow the issuance of a search warrant where, as in this case, the crime to which the evidence at issue relates has not yet occurred and the evidence to be seized is not presently in the possession of the person whose premises are to be searched." *Id.*

179. *See id.* at 374.

180. 904 P.2d 880 (Colo. 1995).

181. *See* COLO. REV. STAT. ANN. § 16-3-303(1)(d) (West 1986) (requiring the affidavit to "establish probable cause to believe that the property to be search[ed] for, seized, or inspected is located at, in or upon the premises, person, place, or thing to be searched").

182. *See Poirez*, 904 P.2d at 880-81.

183. *See id.* at 882.

184. *See id.*

185. For a discussion of *Ex Parte Oswalt*, see *supra* notes 173-79 and accompanying text.

186. *See Poirez*, 904 P.2d at 883.

187. *Id.*

188. *See id.* at 882-83.

189. *See id.* at 883.

190. *See id.* For this conclusion, the court looked to the advisory committee note accompanying Rule 41(a). For the pertinent portion of this advisory commit-

language of the pre-1990 rule, the court concluded that the statute continued to prohibit anticipatory warrants.[191]

The Supreme Court of Iowa also determined that anticipatory search warrants were inconsistent with its state search warrant authorization statute in *State v. Gillespie*.[192] Here, state officials arrested an individual who delivered cocaine to a confidential informant.[193] The individual agreed to cooperate with police and lead them to his supplier, Gillespie.[194] The state police obtained a search warrant for the defendant's home, conditioned on the informant's completion of a controlled drug buy from Gillespie and a field test of the substance bought.[195] These events transpired and the warrant was executed.[196]

Iowa Code sections 808.3 and 808.4 require a sworn application for a search warrant to include "facts, information, and circumstances tending to establish sufficient grounds for granting the application, and probable cause for believing that the grounds exist . . . [and] upon a finding of probable cause for grounds to issue a search warrant, the magistrate shall issue a warrant."[197] The court concluded that "the plain meaning of these statutes is that probable cause must exist at the time the warrant is issued and not at some future time when the warrant is executed."[198] The court relied on language in each statute that required probable cause to exist as of the exact moment when the warrant was issued.[199] Although the lower court had found ambiguity in the statute and interpreted it against the defendant, the appellate court failed to find the statute unclear and reversed the defendant's conviction.[200]

However, state statutes are becoming more and more receptive of anticipatory warrants, as evidenced by the analysis of the Su-

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tee note, see *supra* note 29.

191. *See Poirez*, 904 P.2d at 883.

192. 530 N.W.2d 446 (Iowa 1995).

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *Id.* at 448 (quoting IOWA CODE ANN. §§ 808.3-808.4 (West 1994)).

198. *Id.*

199. *See id.* The court noted the dictionary definition of words in the statute—"circumstance," "fact," and "information"—referred to the past or present only. *See id.* (citing WEBSTER'S NEW WORLD DICTIONARY 113, 220, 311 (2d. ed. 1987)). From this, the court concluded that the statutes "do not contemplate future acts or events as constituting probable cause." *Id.*

200. *See id.* at 449-50.

preme Court of Florida in *Bernie v. State*.[201] The court held that an amendment of the Florida Constitution relating to search and seizures brought Florida law into conformity with the federal case law finding anticipatory search warrants constitutional.[202] In *Bernie*, the police obtained an anticipatory search warrant for the defendant's home after officials discovered cocaine in a package addressed to him.[203] The police executed the warrant after the controlled delivery and searched the defendant's home.[204]

The defendant contended that the search of his home was invalid under both Florida statutory[205] and common law.[206] The court held that a 1982 amendment to the Florida Constitution allowed the use of anticipatory search warrants.[207] Mirroring the Fourth Amendment, the amendment to the state constitution opened the doors for anticipatory warrants.[208] Likewise, the court interpreted the statutory law so as to permit anticipatory warrants, reasoning that the statute:

> allows a warrant to be issued when the evidence and supporting affidavit show that the drugs have already been discovered through a legal search and seizure and are presently in the process of being transported to the designated

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201. 524 So. 2d 988 (Fla. 1988) (per curiam).

202. *See id.* at 989.

203. *See id.*

204. *See id.*

205. *See id.* at 989-90 (citing FLA. STAT. ANN. § 938.18 (West 1996) (prohibiting issuance of warrants when "[t]he law relating to narcotics or drug abuse is being violated therein")).

206. *See id.* (citing Gerardi v. State, 307 So. 2d 853, 855 (Fla. 4th Dist. Ct. App. 1975)) (holding that state statutory law forbids the issuance of search warrants unless a law is being currently violated at that location).

207. *See id.* at 990-91. Article I, section 12 of the Florida Constitution, relating to search and seizure, as amended in 1982 and effective January 3, 1983, provided:

> No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Id.* at 990 (quoting FLA. CONST. art. I, § 12 (1982)). It should be noted that the amended statute makes no requirement that these things be located at the place to be searched when the affidavit is actually sworn.

208. *See id.*

> residence which is being used as the drug drop. It is our view that this is not the type of future allegation for a warrant that the legislature intended to prohibit by this statute.[209]

Like Florida, other states have also recently proposed legislation to amend their search warrant statutes to allow anticipatory search warrants. For example, Colorado and Alabama have successfully amended their statutes to allow such warrants,[210] while Rhode Island and Hawaii have proposed legislation to change their respective state laws.[211]

IV. ANTICIPATORY SEARCH WARRANTS IN MARYLAND

A. Historical Perspective

Until 1997, Maryland courts had not addressed the issue of anticipatory search warrants. In prior cases where anticipatory search warrants were at issue, the Court of Appeals of Maryland based its holdings on alternative grounds.[212] In addition to the Fourth Amendment of the United States Constitution,[213] Maryland citizens are protected against unreasonable search and seizures by Article 26 of the Maryland Declaration of Rights.[214] Except in certain cases, a search of private property without consent is unreasonable unless it

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209. *Id.* at 992.

210. *See* ALA. R. CRIM. P. 3.7-3.8. In 1997, the Alabama Senate introduced Bill No. 150 to revise the related statute.

211. In 1997, the Hawaii Senate introduced Bill No. 2710 to amend the law for anticipatory search warrants. Further, Rhode Island Senate Bill No. 2844 proposed the amendment of the existing warrant statute to allow for anticipatory warrants.

212. *See infra* notes 218-45 and accompanying text.

213. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (making the Fourth Amendment applicable to the states). For the text of the Fourth Amendment, see *supra* note 9.

214. *See* MD. CONST., DECL. OF RIGHTS art. 26 ("[A]ll warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievious and oppressive."). Article 26 is construed to be in pari materia with the Fourth Amendment to the United States Constitution. *See* Gadson v. State, 341 Md. 1, 8 n.3, 668 A.2d 22, 26 n.3 (1995); Givner v. State, 210 Md. 484, 492, 124 A.2d 764, 768 (1956). In addition to the Maryland Constitution and the Fourth Amendment, the Maryland General Assembly passed a statute which further protects citizens by laying out clear procedural requirements for the issuance of a valid search warrant. *See* MD. ANN. CODE art. 27, § 551 (1999) (providing that "any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premises, place or thing to be searched, the grounds for the search warrant and the name of the applicant on whose written application as aforesaid the warrant was issued").

has been authorized by a valid search warrant.[215]

Additionally, section 551(a) of Article 27 protects against unreasonable searches and seizures.[216] Section 551(a) is not a mere reiteration of the Maryland or United States Constitutions; it provides substantive and procedural requirements for a valid warrant.[217] However, it is often applied in addition to these constitutional protections. In *Salmon v. State*,[218] the court of special appeals applied section 551(a) to uphold the search of an individual who entered a building as a warrant was being executed.[219] *Salmon* involved the search of a laundromat for evidence of illegal gambling.[220] Executing a warrant, the police discovered illegal lottery tickets and other incriminating evidence.[221] During the search, Salmon returned to

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215. *See* Peterson v. State, 281 Md. 309, 319, 379 A.2d 164, 169 (1977) ("[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case.").

216. For the text of Article 27, Section 551(a), *see infra* note 254.

217. *See In re* Special Investigation No. 228, 54 Md. App. 149, 160, 458 A.2d 820, 826 (1983). The court of special appeals provided the following nine requirements for a valid warrant:

> (1) that it be issued by a judge; (2) that the application be in writing; (3) that it be signed by the applicant; (4) that it be sworn by the applicant; (5) that it be accompanied by an affidavit containing . . . facts within the personal knowledge of the affiant; (6) that there is probable cause to believe that a crime is being committed or that property subject to a seizure is located on a person or in a place; (7) that the individual or place to be searched be within the territorial jurisdiction of the judge; (8) that the warrant be issued to a duly constituted policeman; and (9) that the warrant name or describe with reasonable particularity, the individual, building, apartment, premises, place or thing to be searched.

Id. at 168, 458 A.2d at 830 (internal quotation marks omitted). A failure of any of the nine requirements would render the warrant unlawful, and a failure of numbers 1, 4, 6, or 9 (or, arguably 7) would render the warrant unconstitutional under the Fourth Amendment. *See id.* at 169, 458 A.2d at 830.

218. 2 Md. App. 513, 235 A.2d 758 (1967).

219. *See id.* at 519, 235 A.2d at 761; *see also* State v. Intercontinental, Ltd., 302 Md. 132, 138, 486 A.2d 174, 177 (1985). The *Intercontinental Limited* court observed:

> To justify the issuance of such a warrant, the statute [551(a)] appears to require that probable cause first be shown that "any misdemeanor or felony" is being committed; . . . and that in connection therewith "property" subject or liable to seizure "under the criminal laws of this State" is located upon the individual or at the place or thing to be searched.

Id. at 138, 486 A.2d at 177.

220. *See Salmon*, 2 Md. App. at 516, 235 A.2d at 759.

221. *See id.* at 516, 235 A.2d at 759-60.

the premises, indicating that she was the owner.[222] After the officers identified themselves, the defendant left the premises.[223] Police stopped her outside the laundromat and secured evidence of illegal gambling on her person.[224] Although the court held that there must be probable cause that a crime *has* been committed, the court found that the search of the defendant was valid due in part to her flight from the premises after she was shown the search warrant.[225] Several decisions following *Salmon* have interpreted section 551(a) to require that items of interest in a search warrant must be on the person or premises at the time the affidavit is sworn.[226]

In *Cable v. State*,[227] the court of special appeals intimated its stance on the validity of anticipatory warrants.[228] In *Cable*, police officers received information that a woman would be arriving at the airport carrying percodan and dilaudid intended for sale in Balti-

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222. *See id.*

223. *See id.*

224. *See id.* at 516-17, 235 A.2d at 759-60.

225. *See id.* at 522-23, 235 A.2d at 763.

226. *See* Wiebking v. State, 19 Md. App. 226, 237, 310 A.2d 577, 584 (1973) (finding a warrant invalid because the police did not have facts that gave probable cause to believe a crime was being committed or that evidence was in the vehicle); German v. State, 14 Md. App. 120, 126, 286 A.2d 171, 174 (1972) (noting that a warrant may be issued if a prudent and cautious man would be justified in believing that the offense had been or was being committed); Buckner v. State, 11 Md. App. 55, 60-61, 272 A.2d 828, 832 (1971) (observing that a judge may issue a warrant when there is probable cause to believe that a crime is being committed and that evidence of the crime is on the person or at the place to be searched); Iannone v. State, 10 Md. App. 81, 87-88, 267 A.2d 812, 816 (1970) (explaining that because a warrant is for particular persons and premises, it does not authorize a search of all persons in the building); Grimm v. State, 6 Md. App. 321, 326-27, 251 A.2d 230, 233-34 (1968) (finding that the allegations in the warrant application must show that an offense had been or was being committed); Hall v. State, 5 Md. App. 394, 396-97, 247 A.2d 548, 549-50 (1968) (providing that probable cause must be proven by the facts in the affidavit showing that a crime has been committed); Kist v. State, 4 Md. App. 282, 284-85, 242 A.2d 586, 587 (1968) (reiterating that probable cause evidence must be confined solely to the affidavit); Frey v. State, 3 Md. App. 38, 44, 237 A.2d 774, 778 (1968) (requiring the judge to be informed of the underlying circumstances in order to particularize the warrant); Scott v. State, 4 Md. App. 482, 488-89, 243 A.2d 609, 613-14 (1967) (stating that probable cause requires a proper showing that a crime is being committed or evidence is on the person).

227. 65 Md. App. 493, 501 A.2d 108 (1985).

228. *See id.* at 494, 501 A.2d at 109.

more.[229] The officers received an anticipatory warrant to search the defendant's bags and belongings when she arrived at the airport.[230] Upon arrival, the defendant was followed by police to a hotel and was arrested.[231] A search of the bags revealed a claim ticket for a briefcase being held in a security room at the hotel.[232] Without obtaining a search warrant, the police seized the briefcase that contained the drugs.[233] The defendant challenged the seizure of the drugs, arguing that the search warrant was invalid because it was anticipatory in nature.[234]

Although the defendant argued that section 551 of Article 27 prohibited the use of anticipatory warrants, the court concluded that this interpretation was "too restrictive a reading of the statute."[235] Rather than addressing the issue of anticipatory warrants, the court concentrated on the control exercised by the defendant over the briefcase.[236] The court characterized the defendant's possession of the briefcase as "constructive"—even though the defendant was not actually carrying the briefcase at the time of the arrest, the police could search it in the room because she possessed a claim check for the briefcase and the warrant expressly included the briefcase.[237] The *Cable* court also reasoned that even if the warrant was defective, it fulfilled the good faith requirement established in *United States v. Leon*,[238] thereby causing the exclusionary rule not to apply.[239] However, the court of special appeals was not the only Maryland court to decide the issue of anticipatory warrants on alternative grounds.

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229. *See id.*

230. *See id.*

231. *See id.* at 495, 501 A.2d at 109.

232. *See id.*

233. *See id.*

234. *See id.* at 497, 501 A.2d at 110-11. The defendant argued that at the time the search warrant was issued, she had not yet committed a crime in Baltimore City, but that the police had based the warrant on the anticipation that drugs would be moved to the city. *See id.*

235. *Id.* at 497, 501 A.2d at 111.

236. *See id.* at 495-97, 501 A.2d at 109-11.

237. *See id.*

238. 468 U.S. 897, 918 (1984) (refusing to apply the exclusionary rule to evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant was subsequently found to be invalid).

239. *See Cable*, 65 Md. App. at 498, 501 A.2d at 111. For a discussion of the exclusionary rule, see *infra* notes 261-76 and accompanying text.

In *State v. Lee*,[240] the court of appeals narrowly avoided the issue of anticipatory search warrants. Based on information provided by a confidential informant, the police obtained a search warrant conditioned on the purchase of LSD by the informant's brother.[241] The court avoided the anticipatory search warrant issue by determining that the informant's information failed to establish probable cause under *Illinois v. Gates*.[242] Consequently, the search warrant was invalid whether or not it was anticipatory.[243] Although the court acknowledged that "a number of appellate courts have addressed the constitutionality of anticipatory warrants,"[244] it refused to decide the case on these grounds because the record did not "compel a constitutional review of anticipatory search warrants, which must await a future case."[245]

B. Maryland's Current Approach to Anticipatory Warrants

In 1997, the Court of Appeals of Maryland confronted that "future case" in *Kostelec v. State*.[246] *Kostelec* presented the common anticipatory warrant scenario, where police intercepted a package containing PCP mailed to a defendant.[247] Law enforcement personnel made a controlled delivery to Lucabaugh's address and arrested him shortly after he left his home with the package.[248] Lucabaugh then informed the police that the package was to be delivered to Roarke Boulton.[249] The police determined that Boulton actually

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240. 330 Md. 320, 624 A.2d 492 (1993).

241. *See id.* at 323-25, 624 A.2d at 493-94.

242. 462 U.S. 213, 238 (1983) (holding that the reliability of information is to be judged under the totality of the circumstances, including considerations of the veracity and basis of knowledge of the informant). *Gates* replaced the former two-pronged test found in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). *See Gates*, 462 U.S. at 238. Refusing to uphold the defendant's conviction, the *Lee* court observed that the information underlying the warrant provided no indication as to the veracity of the informant or the basis of his knowledge. *See Lee*, 330 Md. at 326-27, 624 A.2d at 495.

243. *See Lee*, 330 Md. at 326-27, 646 A.2d at 495. Notably, the State did not raise the *Leon* good faith exception to the exclusionary rule. *See id.* at 327 n.1, 624 A.2d at 495 n.1.

244. *Id.* at 328, 646 A.2d at 496.

245. *Id.* at 329, 646 A.2d at 496.

246. 348 Md. 230, 703 A.2d 160 (1997).

247. *See id.* at 232-33, 703 A.2d at 161.

248. *See id.* at 233, 703 A.2d at 161.

249. *See id.*

lived with the defendant, Kostelec.[250] An anticipatory search warrant was then obtained for the defendant's address to be executed after police delivered the package.[251] The package was delivered and accepted by the defendant.[252] Subsequently, the warrant was executed and the defendant was arrested.[253]

Kostelec moved to suppress the evidence gathered at his home, arguing that the search warrant did not comply with the narrowly drawn section 551[254] and that anticipatory search warrants had never been validated by the Maryland legislature.[255] The court of appeals granted certiorari solely on the question of whether an anticipatory search warrant issued on the basis of an affidavit lacking probable cause that a crime was being committed at the time of the issuance was in compliance with Article 27, section 551(a).[256] The court of appeals interpreted the present tense verbs of section 551(a) to require probable cause to exist at the time the affidavit is sworn for a warrant.[257] The court literally interpreted the statute, requiring the

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250. *See id.*

251. *See id.* at 233-34, 703 A.2d at 161.

252. *See id.* at 234, 703 A.2d at 162.

253. *See id.*

254. Article 27, section 551(a) provides:

> Whenever it be made to appear to any judge . . . by written application signed and sworn to by the applicant, accompanied by an affidavit . . . containing facts within the personal knowledge of the affiant . . . that there is probable cause, the basis of which shall be set forth in said affidavit . . . to believe that any misdemeanor or felony is being committed by any individual or in any building . . . or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building . . . then the judge may forthwith issue a search warrant.

Id. (quoting MD. ANN. CODE art. 27, § 551(a) (1997)).

255. *See id.* at 234-35, 703 A.2d at 162.

256. *See id.* at 235, 703 A.2d at 163. On direct appeal, the court of special appeals affirmed the trial court's decision and rejected Kostelec's argument that anticipatory search warrants did not comply with the language found in section 551(a) of Article 27. *See* Kostelec v. State, 112 Md. App. 656, 670-71, 685 A.2d 1222, 1229-30 (1996) (finding the language of the Maryland statute "at best ambiguous"), *rev'd*, 348 Md. 230, 703 A.2d 160 (1997). The court of special appeals held that section 551(a) was in pari materia with the Fourth Amendment which has been held to permit anticipatory search warrants. *See id.* at 669-70, 685 A.2d at 1229. The court noted that it should not decide a constitutional issue unless the record compels such a determination, and the court rested on the construction of section 551(a) only. *See id.*

257. *See Kostelec*, 348 Md. at 235, 703 A.2d at 163.

crime underlying the probable cause is currently "being committed," and that the property "is situated or located" on the described premises at the time the magistrate is asked to issue the search warrant.[258] The court concluded that "[t]he incompatibility of the language of section 551(a) with anticipatory warrants is explained by the fact that the language under consideration formed part of the statute's original enactment by Chapter 749 of the Acts of 1939, [which was] long before anticipatory warrants came into use."[259] The court held that anticipatory search warrants are not authorized in Maryland and reversed the decision of the court of special appeals.[260]

1. The Exclusionary Rule and Its Nexus with Article 27, Section 551

Once the *Kostelec* court found anticipatory warrants inconsistent with section 551, the next natural question for the court was the appropriate remedy. For constitutional violations, courts apply the exclusionary rule—a court-created remedy suppressing evidence obtained in violation of a defendant's rights from use in the government's case-in-chief.[261] The primary purpose of the exclusionary rule is to discourage police misconduct by removing the temptation to violate citizens' constitutional rights.[262] The exclusionary rule lost a significant amount of its effectiveness as a deterrent after the Supreme Court's decision in *United States v. Leon.*[263] In *Leon,* the Court adopted a good faith exception to the exclusionary rule and reasoned that officers should not be punished for executing warrants that they believe, in good faith, are valid.[264] Prior to *Kostelec,*

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258. *See id.* The court quoted a portion of Article 27, section 551(a) which specifically requires "that there is probable cause . . . to believe that any misdemeanor or felony is being committed . . . or that any property subject to seizure . . . is situated or located . . . in or on any such building." *Id.*

259. *Id.* at 237, 703 A.2d at 163.

260. *See id.* at 240, 703 A.2d at 165.

261. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961) (excluding evidence that the accused was forced to give as a result of an unlawful seizure); *see also* WHITEBREAD & SLOBOGIN, *supra* note 33, at 17.

262. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (observing that a purpose of the exclusionary rule is to deter police misconduct); United States v. Calandra, 414 U.S. 338, 348 (1974) (observing that the exclusionary rule is designed to protect Fourth Amendment rights through its deterrent effect); *see also* David P. Mitchell, *Anticipatory Search Warrants: The Supreme Court's Opportunity to Reexamine the Framework of the Fourth Amendment,* 44 VAND. L. REV. 1387, 1396-98 (1991) (discussing the evolution of the exclusionary rule).

263. 468 U.S. 897 (1984).

264. *See id.* at 913; *see also* Mitchell, *supra* note 262, at 1396.

the *Leon* decision was closely tied to the issue of anticipatory warrants in Maryland. This tie is exemplified in both *Cable* and *McDonald,* where the courts invoked the good faith exception when the warrant was found to be defective.[265]

The court in *Kostelec* chose not to address the issue of whether the exclusionary rule was the proper remedy for a violation of Article 27, section 551.[266] However, it is doubtful that the court of appeals would impose the exclusionary rule for violations of the statute. In previous Maryland decisions, the court has intimated that Article 27, section 551 contains no exclusionary remedy.[267]

In re Special Investigation No. 228,[268] provides a detailed analysis of Article 27, section 551 and its relation to the exclusionary rule.[269] The court in *In re Special Investigation No. 228* explained that Article 27, section 551 does not require a court to apply the exclusionary rule to remedy a violation of the statute.[270] While the statute does provide that evidence seized should be returned to the rightful owner, it is silent on the issue of whether the evidence can be used in the government's case-in-chief.[271]

The Court of Appeals of Maryland again addressed the exclusionary rule in conjunction with Article 27, section 551 in *Chu v. Anne Arundel County.*[272] Here, the defendant argued that property taken from him during an illegal search and seizure should not be included in an affidavit supporting a search warrant.[273] While acknowledging the existence of the exclusionary rule for Fourth Amendment violations, the court held that Chu was not entitled to

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265. *See supra* notes 227-39 and accompanying text. For a discussion of Cable v. State, 65 Md. App. 493 (1985); *see also* McDonald v. United States, 335 U.S. 451 (1948).

266. *See* Kostelec v. State, 348 Md. 230, 243, 703 A.2d 160, 166 (1997).

267. *See* Chu v. Anne Arundel County, 311 Md. 673, 686, 537 A.2d 250, 256 (1988) (noting that section 551(a) does not contain an exclusionary rule); *see also In re* Special Investigation No. 228, 54 Md. App. 149, 157-65, 458 A.2d 820, 824-28 (1983) (contrasting the Fourth Amendment with section 551(a) of Article 27).

268. 54 Md. App. 149, 458 A.2d 820 (1983).

269. *See id.* at 159-77, 458 A.2d at 825-35.

270. *See id.* at 166-68, 458 A.2d at 825-34.

271. *See id.* at 166-67, 458 A.2d at 829. Subsection (c) of the statute mandates that property rightfully taken must be returned after there is no further need for the retention of the property. *See id.* at 167, 458 A.2d at 829. This implies that it can be retained until after presentation of the prosecutor's case-in-chief.

272. 311 Md. 673, 537 A.2d 250 (1988).

273. *See id.* at 686, 537 A.2d at 251.

such a remedy under Article 27, section 551.[274]

Much like the courts in *In re Special Investigation No. 228* and *Chu*, the *Kostelec* court failed to find an exclusionary remedy in Article 27, section 551.[275] However, because the State failed to raise this issue in Kostelec's suppression hearing, the court refused to rule on the availability of the exclusionary rule to Kostelec's case.[276] Thus, when addressing the issue of anticipatory warrants in Maryland, future courts may still permit the use of the evidence obtained through such warrants even though they have been held to be in violation of the Maryland statute.

C. Anticipatory Search Warrants: Their Future in Maryland

Several state courts, including Florida, Colorado, and Alabama, have held that anticipatory warrants are inconsistent with their respective state statutes and have indicated that the state statutes will have to be amended to achieve a different result.[277] Through its holding that anticipatory search warrants are inconsistent with Maryland statutory law, the Court of Appeals of Maryland has sent a clear message to the Maryland General Assembly that it is time to amend the law.[278] In *Kostelec*, the court gave no definite implication as to how they would rule on the issue if anticipatory warrants were allowed by statute.[279] However, the case law from a multitude of federal courts and states that have amended their statutes suggests that anticipatory warrants remain within the dictates of the Fourth Amendment.[280]

By disallowing anticipatory search warrants, Maryland courts deprive law enforcement agencies of a powerful tool to combat drug trafficking. Anticipatory search warrants aid law enforcement officers in their effort to combat drug traffickers, who easily move evidence before officers can obtain traditional search warrants. Without this asset, which is readily available to law enforcement in most other jurisdictions in the nation,[281] local law enforcement will likely lobby aggressively for an amendment to the current Maryland law.

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274. *See id.* at 680, 537 A.2d at 256.
275. *See* Kostelec v. State, 348 Md. 230, 240-42, 703 A.2d 160, 165-66 (1997).
276. *See id.*
277. *See supra* notes 173-211 and accompanying text.
278. *See Kostelec*, 348 Md. at 240, 703 A.2d at 165.
279. *See supra* notes 16-20 and accompanying text.
280. *See supra* notes 131-68 and accompanying text.
281. *See supra* note 132 and accompanying text.

Given today's anti-crime climate,[282] it is likely that law-makers would likewise support an amendment to the statute, so as to bolster the effectiveness of law enforcement.[283]

In February of 1998, Maryland House Bill 706 was introduced in the Maryland legislature calling for the repeal, amendment, and re-enactment of Article 27, section 551 of the Annotated Code of Maryland.[284] Bill 706 proposed that Article 27, section 551 be amended to include the future tense language, "there is probable cause . . . to believe that any misdemeanor or felony is being committed OR WILL BE COMMITTED."[285] However, this Bill failed in the judiciary committee, and the law in Maryland remains unchanged for now.[286]

V. ANTICIPATORY SEARCH WARRANTS AND THE SUPREME COURT

Even if Article 27, section 551(a) is amended to permit anticipatory search warrants,[287] these warrants may be challenged on constitutional grounds. However, a majority of courts that have addressed the constitutionality of anticipatory warrants have concluded that they are consistent with the requirements of the Fourth Amendment.[288] Although no Maryland court has addressed the constitutionality of anticipatory warrants,[289] the girth of federal case law

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282. *See* Sara S. Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40-47 (detailing the political climate, the media's effect on the public's perception of crime, and explaining the history and reasoning underlying the public's current anti-crime attitude); Richard L. Burke, *Crime is Becoming Nation's Top Fear: Poll Shows Economy Losing First Place as a Concern*, N.Y. TIMES, Jan. 23, 1994, at A1 (discussing the fact that Americans now view crime as the most important problem that society faces today).

283. *See* Kenneth Jost, *Exclusionary Rule Reforms Advance*, 81 A.B.A.J., May 1995, at 18 (discussing a move by the Republican majorities in Congress to pass legislation that would effectively abolish the exclusionary rule in federal courts because the rule favors criminals, and "We're losing convictions all around the country").

284. *See* H.B. 706 (Md. 1998).

285. *Id.* at 2.

286. *See also* MD. ANN. CODE art. 27, § 551 (1996 & Supp. 1998). The fact that the statute has remained unchanged to date leads to the conclusion that the bill was not accepted.

287. In order for an anticipatory search warrant to be permitted in Maryland, the language of Article 27, section 551(a) must be amended to include the future tense language—"will be committed."

288. *See supra* note 132 and accompanying text.

289. *See* Kostelec v. State, 348 Md. 230, 236, 703 A.2d 160, 162 (1997). Although an-

indicates that future constitutional challenges to these warrants may be decided by the Supreme Court.

If the Supreme Court were to actually grant a writ of certiorari to address anticipatory search warrants, these would likely be upheld. During the Warren Court era, the Supreme Court dramatically expanded the defendant's federally protected constitutional rights.[290] Since the end of the Warren Court, the Court's attitude toward this issue has shifted dramatically.[291] A prevalent theme of the post-Warren Courts is that "the ultimate mission of the criminal justice system is to convict the guilty and let the innocent go free."[292] The decisions of the post-Warren Courts suggest that "the rights enumerated in the Constitution are not all entitled to the same degree of judicial protection, but instead should be valued according to their impact on the adequacy of the guilt determining process."[293]

Post-Warren courts have considerably watered down the Fourth Amendment's ban on unreasonable search and seizure with their less than enthusiastic treatment of the exclusionary rule.[294] Unlike the Warren Court, which preferred the adoption of specific rules to

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other ground of attack may be Article 26 of the Maryland Constitution, this will likely be a weak argument because this provision is interpreted in pari materia with the Fourth Amendment. *See supra* note 212 and accompanying text.

290. In the early and mid-1960s, the Court began creating a wide variety of rules designed to provide those involved in the criminal justice system with adequate protection from overreaching by the state. An example of this is *Mapp v. Ohio*, in which the Court held that any evidence seized in violation of the defendant's Fourth Amendment rights must be excluded from state and federal prosecution. *See* Mapp v. Ohio, 367 U.S. 643, 654 (1961).

291. President Nixon appointed Chief Justice Burger in 1969, Justice Blackmun in 1970, and Justice Powell and Justice Rehnquist in 1972. Rehnquist became Chief Justice in 1987. The appointment of Justice Rehnquist has been deemed to be the beginning of a conservative era for the Court. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996) ("[T]he Court has clearly become less sympathetic to claims of individual rights and more accommodating of assertions of the need for public order."); James F. Simon, *Speech: Politics and the Rehnquist Court*, 40 N.Y.L. SCH. L. REV. 863, 863-64 (1996) ("Rehnquist's conservative vision would severely limit the protections of civil rights litigants under the Fourteenth Amendment and civil rights statutes, and, in general, approve governmental authority at the expense of individual rights.").

292. WHITEBREAD & SLOBOGIN, *supra* note 33, § 1.02, at 4.

293. Id.

294. *See Mapp*, 367 U.S. at 653-54.

guide law enforcement officers and courts, subsequent Courts have relied on a "totality of the circumstances" analysis to determine probable cause.[295] Although affording police and courts more flexibility in evaluating probable cause, this approach has facilitated standardless police conduct. As a result of the Court's "totality of the circumstances" approach, there has been a relaxation of constitutional restrictions on law enforcement.[296]

Moreover, today's Court employs the "Crime Control Model" of criminal procedure, which places a premium on efficiency and quick adjudication of defendants.[297] This model of criminal procedure requires that any limitation placed on law enforcement officials should be solely out of a desire to promote the reliability of the outcome; purely technical controls on police behavior are inconsistent with this model of the criminal process.[298] Under this model, anticipatory search warrants are a "purely technical control;"[299] the current Court would likely view these warrants as a merely technical restraint on police behavior, which would unnecessarily delay police in bringing the guilty to justice. Therefore, the current Court would likely endorse the use of anticipatory warrants by finding them to be valid under the Fourth Amendment.

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295. *See* Illinois v. Gates, 462 U.S. 213, 230-31 (1983) ("[The] totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip."); *cf.* Rawlings v. Kentucky, 448 U.S. 98, 106 (1980) (explaining that the Court has moved away from a two step standing inquiry to the single question of "whether government officials violated any legitimate expectation of privacy"); Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977) (recognizing that when addressing the constitutionality of extrajudicial identifications the test is whether the identification was reliable under a totality of the circumstances).

296. *See* New York v. Belton, 453 U.S. 454, 460 (1981) (permitting search of car's interior when the occupant is arrested); United States v. Robinson, 414 U.S. 218, 235 (1973) (permitting a search incident to a lawful arrest for all crimes); *see also* Mitchell, *supra* note 33, at 1400-07.

297. *See* WHITEBREAD & SLOBOGIN, *supra* note 33, § 1.03, at 9 (discussing Herbert Packer's study of the criminal process in Herbert L. Packer, *The Limits of the Criminal Sanction*, pt. II, ch. 8, at 149 (1968)).

298. *See id.* at 10.

299. *Id.*

VI. THE PROS AND CONS OF ANTICIPATORY SEARCH WARRANTS

A. The Advantages of Anticipatory Warrants

On closer examination, it becomes apparent that anticipatory warrants can provide significant advantages to law enforcement officers seeking to protect the public. Proponents of anticipatory warrants see them as a necessary weapon in the "War on Drugs."[300] The evolution of the inner city drug trade includes an increased use of crack houses, from which dealers can distribute drugs quickly after delivery. This mobility indicates that law enforcement personnel should be able to rely on anticipatory warrants as a means to seize large drug shipments before they are moved.[301] Proponents also claim that any dangers posed by anticipatory warrants can be controlled by judges and magistrates who place strict guidelines on their use.[302] The analytical breakdowns undertaken by the *Garcia*[303] and *Gendron*[304] courts support this argument by creating the impression that judges and magistrates consider a strict set of criteria before issuing anticipatory warrants.[305]

In the context of government agents intercepting illegal material in the mail, anticipatory warrants also serve a useful purpose for law enforcement and society as a whole. For example, in the case of intercepted child pornography, merely destroying the contraband would only provide a short-term solution to a social pathology.[306] On the other hand, an anticipatory warrant for the premises where the child pornography is to be delivered allows law enforcement to arrest the subscriber and limit the child exploitation market at the same time.[307]

Another valid argument presented by proponents of anticipatory warrants is that without them, law enforcement will be left with the option to conduct warrantless searches under the guise of the exigent circumstances exception.[308] Without the protection of a

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300. *See* Powers, *supra* note 31, at 59.

301. *See id.* at 62.

302. *See id.* at 63.

303. For a discussion of *Garcia*, see *supra* notes 114-30 and accompanying text.

304. For a discussion of *Gendron*, see *supra* notes 76-86 and accompanying text.

305. *See supra* notes 76-86, 114-30 and accompanying text.

306. *See* Adams, *supra* note 32, at 701-02.

307. *See id.*

308. *See* Mincy v. Arizona, 437 U.S. 385, 392 (1978) (asserting that "the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency" (quoting Wayne v.

sworn affidavit before a neutrally detached magistrate, the possibility of police misconduct increases.[309]

B. The Dangers of Anticipatory Warrants

The primary dangers associated with anticipatory search warrants are the power and discretion that they entrust to law enforcement personnel. By relying on the prophetic testimony of police officers as to events that will occur in the future, courts no longer base the issuance of warrants on facts that exist, but rather are permitted to base warrants on facts that *may* exist in the future.[310] With the establishment of the good faith exception in *Leon*,[311] it is even more dangerous when police inaccurately predict future events and execute searches based on their flawed predictions.[312]

While anticipatory search warrants can be practical law enforcement tools for combating the distribution of illegal narcotics and other contraband, they provide officials with ample opportunity to abuse their discretion. Originally, the "on a sure course" requirement provided a guarantee that a package containing contraband had an established destination and law enforcement could obtain warrants in anticipation of the delivery of the package to that address.[313] Yet, subsequent applications of the "on a sure course" test have diluted the strict criteria for the issuance of anticipatory warrants.[314] The *Garcia* decision went even further to shy away from strict adherence to the "on a sure course" test by applying a list of criteria that reflects a "totality of the circumstances" motif.[315] Without the strict application of the "on a sure course" test, law enforce-

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United States, 318 F.2d 205, 212 (D.C. Cir. 1963))); Warden, Maryland Penitentiary v. Harden, 387 U.S. 294, 298-99 (1967) (indicating that the Fourth Amendment will not impede an investigation when doing so would endanger lives); United States v. Brock, 667 F.2d 1311, 1318 (9th Cir. 1982) (allowing a warrantless search based on the exigency of locating explosive materials used to produce methamphetamine); WHITEBREAD & SLOBOGIN, *supra* note 33, § 9.01-04, at 202-08 (discussing the parameters of the evanescent evidence exception to the warrant requirement); Messina, *supra* note 6, at 408.

309. *See* McDonald v. United States, 335 U.S. 451, 455-56 (1948).

310. *See* Messina, *supra* note 6, at 407-08 (discussing the dangers of anticipatory warrants).

311. For a discussion of *Leon*, see *supra* notes 263-265 and accompanying text.

312. For a discussion of the good faith exception to the exclusionary rule, see *supra* note 264 and accompanying text.

313. *See supra* notes 68-86 and accompanying text.

314. *See supra* notes 87-103 and accompanying text.

315. For a discussion of *Garcia*, see *supra* notes 114-30 and accompanying text.

ment personnel now have the opportunity to manipulate a package's final destination, thereby enhancing the possibility of abuse.

This danger was clearly illustrated in *Kostelec*.[316] Here, police arrested a man after he left his home with a package that the police knew to contain PCP.[317] After police arrested the man, they relied on his statements to obtain an anticipatory search warrant for the home of Kostelec.[318] Although the package was not addressed to Kostelec, the police arranged to have it delivered to his home.[319] Without the information supplied by the individual who had been arrested for possession of narcotics, the police would have been unable to determine that Kostelec's home was the package's final destination. This factual scenario suggests that police have the ability to orchestrate the delivery of a package to any address and, more importantly, to obtain a search warrant for that address in anticipation of its delivery. Although the court in *Kostelec* never addressed the "on a sure course" issue, the facts are not completely different from those in *Garcia*, where a federal court upheld a search pursuant to an anticipatory warrant even though there was no "sure course" for the contraband.[320]

In addition to the possible abuse of police discretion that can accompany the use of anticipatory search warrants, revisions of the standards for determining probable cause present a precarious proposition. Due to the Supreme Court's abandonment of clear criteria for probable cause determinations,[321] what seems legally permissible under the "totality of the circumstances" rubric can lead down a slippery slope away from adherence to the fundamental principles enumerated in the Fourth Amendment.

VII. CONCLUSION

The use of anticipatory search warrants has been widely accepted by both federal and state courts.[322] State courts that have suppressed evidence gathered pursuant to anticipatory warrants have done so solely because they contradicted the requirements for valid search warrants in state statutes.[323] *Kostelec* forced Maryland

316. For a discussion of *Kostelec*, see *supra* notes 246-60 and accompanying text.
317. *See* Kostelec v. State, 348 Md. 209, 232-33, 703 A.2d 160, 161 (1997).
318. *See id.* at 233, 703 A.2d at 161.
319. *See id.* at 232-33, 703 A.2d at 161.
320. *See supra* notes 114-130 and accompanying text.
321. *See supra* Section V.
322. *See supra* Sections II., III.A.
323. *See supra* Section III.B.

courts to confront whether anticipatory search warrants were valid under state law and have consequently brought about a temporary end to their use.[324]

Although anticipatory search warrants have been held to be inconsistent under current law,[325] this does not mean that Maryland has forever bid farewell to the use of such warrants. Anticipatory search warrants provide a valuable tool for law enforcement in their efforts to combat drug traffickers who can easily move the evidence of their crimes before police officers are able to obtain traditional search warrants.[326]

If the law in Maryland were amended to allow for the use of anticipatory search warrants, the validity of such warrants could only be attacked on Fourth Amendment grounds.[327] The Supreme Court has yet to grant certiorari on the issue of anticipatory search warrants; judging from the Court's current conservative posture, it is likely that anticipatory warrants would be held constitutional.[328]

Yet, there is a strong temptation for law enforcement officials to abuse anticipatory warrants.[329] The ability of officials to obtain search warrants for locations that they contend will contain evidence of a crime sometime in the future creates the possibility of police error and misconduct.[330] As seen in *Kostelec*, police can manipulate where illegal materials are delivered and then obtain warrants for that location.[331] If anticipatory search warrants are permitted in Maryland in the future, it is essential that their use be governed by strict guidelines and procedures to prevent a further erosion of the rights of Maryland citizens.[332]

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324. *See supra* notes 246-60 and accompanying text.
325. *See supra* Section IV.B.
326. *See supra* Section IV.A.
327. *See supra* notes 287-88 and accompanying text.
328. *See supra* Section V.
329. *See supra* Section VI.B.
330. *See supra* notes 310-20 and accompanying text.
331. *See supra* notes 316-20 and accompanying text.
332. *See supra* Section IV.C.