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## Prospective Search Warrants In Florida: You Had Better Not Send Your Drugs Home In The Mail!

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# Prospective Search Warrants In Florida: You Had Better Not Send Your Drugs Home In The Mail!

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## **Abstract**

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**KEYWORDS:** drugs, home, mail

# PROSPECTIVE SEARCH WARRANTS IN FLORIDA: YOU HAD BETTER NOT SEND YOUR DRUGS HOME IN THE MAIL!

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## INTRODUCTION

Unfortunately, the State of Florida is one of the most popular points of entry for illicit narcotics into the country. Consequently, law enforcement officials will seek out more proactive approaches, such as "anticipatory warrants," to combat the drug problem.

An "anticipatory" or "prospective" search warrant "is a warrant based upon an affidavit showing probable cause that at some future time, but not presently, certain evidence of a crime will be located at a specific place."<sup>1</sup> This type of warrant is usually sought by law enforcement officials after the discovery of contraband in a package by postal or custom officials.<sup>2</sup> The law enforcement authorities then set forth in an affidavit the probable cause for the anticipatory warrant based upon the facts surrounding the contraband discovery. After the issuance of the warrant, the authorities and postal officials usually work closely together to effect a controlled delivery of the package to a specified addressee. The warrant is executed at this time or shortly thereafter.

The majority of courts that have addressed the issue of anticipatory warrants have found their issuance constitutionally permissible.<sup>3</sup> This comment will examine the validity of anticipatory search warrants for private dwellings in Florida after the Florida Supreme Court deci-

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1. 2 W. LAFAVE, SEARCH & SEIZURE § 3.7(c), at 94 (3d ed. 1987).

2. W. RINGEL, SEARCH & SEIZURE, ARRESTS AND CONFESSIONS § 4.2(b), at 4-18 (2d ed. 1986).

3. United States *ex rel.* Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969); United States v. Outland, 476 F.2d 581 (6th Cir. 1973); United States v. Feldman, 366 F. Supp. 356 (D. Hawaii 1973); United States v. Goff, 681 F.2d 1238 (9th Cir. 1982); Johnson v. State, 617 P.2d 1117 (Alaska 1980); State v. Cox, 110 Ariz. 603, 522 P.2d 29 (1974); Alvidres v. Superior Ct., 12 Cal. App. 3d 575, 90 Cal. Rptr. 682 (1970); Commonwealth v. Soares, 384 Mass. 149, 424 N.E.2d 221 (1981); State v. Mier, 370 A.2d 515 (N.J. Super. Ct. App. Div., 1977); People v. Glen, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972). See *infra* text p. 16-21 and note 117.



sion, *Bernie v. State*.<sup>4</sup> This decision upheld the use of anticipatory search warrants to search a dwelling for narcotics after the controlled delivery of narcotics by police. The court based its decision primarily upon *Illinois v. Andreas*,<sup>5</sup> which dealt with a warrantless seizure of narcotics under exigent circumstances. The court also liberally construed a thirty year old Florida statute relating to the search of a dwelling for narcotic violations.<sup>6</sup> This case will be analyzed in order to determine the present state of the law regarding anticipatory search warrants in Florida. Other jurisdictions will be discussed in order to provide a comparison to the Florida approach. The author will also present his recommendations for how the legislature should react to this decision.

### THE FACTS

The defendants, Dr. Bruce Bernie and his wife Vickie, lived on Siesta Key in Sarasota, Florida. On October 13, 1983, Emery Air Freight of Tampa received an envelope addressed to Vickie Bernie at the couples' residence. The envelope, which was marked "urgent . . . deliver immediately" accidentally broke open during transit revealing a suspicious substance.<sup>7</sup> Emery contacted a drug enforcement agent, who subsequently performed a field test on the substance, identifying it as cocaine. The agent then resealed the envelope and contacted a Sarasota County detective.

On October 14, 1983, the detective asked a circuit court judge to issue a search warrant for the Bernie's residence relative to the prospective controlled delivery of the cocaine. The search warrant was issued based upon the detective's supporting affidavit reciting the preceding facts.<sup>8</sup> The police subsequently arranged for a controlled delivery

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4. *Bernie v. State*, 524 So. 2d 988 (Fla. 1988).

5. *Illinois v. Andreas*, 463 U.S. 765 (1983).

6. FLA. STAT. § 933.18(5) (1983).

7. *State v. Bernie*, 472 So. 2d 1243, 1244, (Fla. 2d Dist. Ct. App. 1985).

8. The affidavit recited in part:

That based upon your affiant's experience as a law enforcement officer, and narcotics detective, and further upon the events described above, your affiant believes that BRUCE AND VICKIE BERNIE are in fact EXPECTING this package TO BE DELIVERED at their residence (apartment) at #608C, 5770 Midnight Pass Road, Sarasota, Florida. Your Affiant was advised that the package WOULD BE delivered to the residence on the afternoon of October 14, 1983. Your Affiant therefore believes that the suspect cocaine WILL BE inside the residence of #608C, Midnight



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by an Emery agent to Mrs. Bernie at the couple's residence. A few minutes after Mrs. Bernie had taken possession, the search warrant was executed and items containing cocaine residue were discovered.<sup>9</sup> The Bernies were arrested and charged with possession of cocaine.<sup>10</sup>

The Bernies filed a successful motion to suppress the evidence as a product of an unreasonable search and seizure contrary to Florida Statutes section 933.18(5).<sup>11</sup> Section 933.18(5) requires that a present or known violation of a narcotics law must exist in the dwelling to be searched prior to the warrant's issuance.<sup>12</sup> This must also be alleged in the supporting affidavit.<sup>13</sup>

In *State v. Bernie*,<sup>14</sup> the district court reversed the lower court's decision on different grounds; however, it agreed that the warrant was invalid under the statute. The court found section 933.18(5) requirements to be very explicit.<sup>15</sup> The affidavit was legally inadequate because it only indicated an expectation that a violation of narcotic laws "would be" occurring within the Bernies' home immediately after the controlled delivery.<sup>16</sup> Therefore, the court held the warrant invalid because narcotic laws were not being violated in the Bernies' home when the warrant was issued. For this reason, the court found that the war-

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Pass Road, Sarasota, Florida with the full knowledge of Bruce and Vickie Bernie (emphasis added).

*Id.* at 1245.

9. The following items were discovered:
1. a hollow pen containing cocaine residue,
  2. a knife and a small mirror,
  3. cocaine residue from the rim of a toilet seat, and
  4. a Emery envelope and wrapping.

*Id.*

10. This was in violation of FLA. STAT. § 893.13 (1983).
11. FLA. STAT. § 933.18(5) (1983).
12. *Bernie*, 472 So. 2d at 1245.
13. FLA. STAT. § 933.18 provides:

No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless: . . . (5)The law relating to narcotics or drug abuse is BEING VIOLATED THEREIN; . . . No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some credible witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based (emphasis added).

14. 472 So. 2d 1243 (Fla. 2d Dist. Ct. App. 1985).
15. *Id.* at 1245.

16. *Id.* at 1246.



rant invalid.

The district court, however, still reversed the suppression order because of the 1982 amendment to Article I, section 12 of the Florida Constitution which purports to construe the Florida exclusionary rule in conformity with the federal fourth amendment.<sup>17</sup> The *Bernie* court relied in part upon *State v. Lavazzoli*,<sup>18</sup> which interpreted the 1982 amendment as linking Florida's exclusionary rule to the federal exclusionary rule. Therefore, since the search of the *Bernie*'s residence occurred after the effective date of the amendment,<sup>19</sup> the court could apply federal exceptions to the warrant requirement.<sup>20</sup>

17. The amended Article I, section 12 provides:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

FLA. CONST. art. I, § 12.

18. 434 So. 2d 321 (Fla. 1983).

19. The amendment took effect January 3, 1983.

20. The district court applied the "good faith" exception to the warrant requirement as set forth in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Supreme Court held that the fourth amendment exclusionary rule did not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate, but that was ultimately found to be unsupported by probable cause. *Id.* at 904. The search warrant was originally held invalid because the affidavit failed to establish a confidential informant's credibility. *Id.* at 906. The Court reasoned that the exclusionary rule operated as a deterrent to police misconduct rather than to cure a transgression of a person's rights. *Id.* Therefore, the Court used a "cost and benefits" analysis to balance the social costs of excluding trustworthy tangible evidence against the benefits of deterring police misconduct. *Id.*

The *Leon* Court stated that if the exclusion of evidence obtained pursuant to a subsequently invalidated warrant was to have any deterrent effect, it would have to alter the behavior of the police. *Id.* at 918. "We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Id.* Consequently, "when law enforcement officers have acted in objective good faith, . . . the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Id.* at 908 (citing *Stone v. Powell*, 428 U.S. at 490, (1976)).

Under the cost-benefit approach of *Leon*, the district court held that the exclusion of the cocaine would be improper because "there was no police illegality and thus nothing to deter." *Bernie*, 524 So. 2d at 1247 (citing *Leon*, 468 U.S. at 921). The court found that the detective acted in objective good faith in securing the warrant because the detective conducted an independent investigation, submitted all the information to



The Florida Supreme Court approved the district court's result on still other grounds and held that the anticipatory search was valid.<sup>21</sup> The court found that the warrant issued under these circumstances did not violate the United States Constitution, the Florida Constitution or section 933.18(5) of the Florida Statutes (1983).<sup>22</sup>

### THE BERNIE OPINION

The Florida Supreme Court began its analysis by examining case law from New York and federal circuit courts of appeals to determine the constitutionality of anticipatory search warrants. After surveying the law, the court correctly concluded<sup>23</sup> that anticipatory warrants were not "constitutionally invalid for lack of a present violation of law at the premises where the contraband will be delivered in the future."<sup>24</sup> Furthermore, the court could not find any language in either the Florida or United States Constitution that prohibited the issuance of a warrant for service at a future time.<sup>25</sup>

The problem with the *Bernie* decision begins with the majority's reliance on the United States Supreme Court case, *Illinois v. Andreas*.<sup>26</sup> At first glance, *Andreas* appears to factually resemble the case at bar. However, this author agrees with dissenting Justices Kogan and Barkett, "that the facts in *Andreas* are sufficiently dissimilar from those in this case to remove the controlling effect of *Andreas*."<sup>27</sup>

In *Andreas*, the Supreme Court held that the warrantless reopen-

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the circuit judge for a probable cause determination and obtained a facially valid warrant authorizing the search. *Bernie*, 472 So. 2d at 1247. Since the magistrate was responsible for determining the sufficiency of the warrant, the officer should not be punished for the judge's error. Therefore, the court applied the "good faith" exception to the improperly issued warrant and held that the exclusionary rule did not apply to prevent the use of cocaine as evidence in the case at bar. *Id.* at 1248.

21. *Bernie v. State*, 524 So. 2d 988 (Fla. 1988).

22. *Id.* (The court also held that the 1982 amendment to the Florida Constitution, brought the states search and seizure laws into conformity with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of the amendment. This later issue is only addressed according to how the district court of appeals applied it to the case at bar).

23. See *supra* note 3 (the majority of the court's that addressed the issue of anticipatory warrants found the issuance constitutionally permissible).

24. *Bernie*, 524 So. 2d at 991.

25. *Id.*

26. *Illinois v. Andreas*, 463 U.S. 765 (1983).

27. *Bernie*, 524 So. 2d 988, 997 (1988) (Fla. 1988) (Kogan, J., dissenting).



ing of a sealed container, in which contraband drugs had been discovered by a lawful border search, was valid absent a substantial likelihood that the contents had been changed.<sup>28</sup> The Court reasoned that there was no legitimate expectation of privacy in the contents of a container previously opened under lawful authority.<sup>29</sup>

The facts in *Andreas* are somewhat similar initially, but the differences clearly distinguish *Bernie*. In *Andreas*, a large locked metal container was shipped from Calcutta to the defendant at Chicago's O'Hare International Airport. A customs inspector opened the container and discovered a wooden table with marijuana hidden inside. The inspector contacted a drug enforcement agent, who chemically identified the substance as marijuana. The table and container were resealed for a controlled delivery to the defendant's residence.

The next day, the DEA agent and a local Chicago police inspector made a controlled delivery at the defendant's apartment. The defendant requested that the officers leave the container in the hallway outside his apartment. After delivery, the local officer left the scene to secure a search warrant, while the DEA agent remained to survey the apartment. The defendant was observed pulling the container inside his apartment and was later seen exiting his apartment. The defendant walked down the corridor and looked out the window. About thirty to forty-five minutes after the controlled delivery, the defendant left his apartment with the container and was subsequently arrested by the DEA agent. The defendant was taken down to the police station, where the officers reopened the container and seized the marijuana found inside. No search warrant had been obtained.<sup>30</sup>

The threshold issue before the Court was "whether an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched container."<sup>31</sup> The Court decided that an individual did not have a legitimate expectation of privacy and explained:

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28. *Andreas*, 463 U.S. at 765.

29. *Id.* at 771.

30. *Id.* at 768.

31. *Id.* at 771.



The privacy interest in the contents of a container diminishes with respect to a container that law enforcement authorities have already lawfully opened found to contain illicit drugs. No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal. The simple act of resealing the container to enable police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights.<sup>32</sup>

The Court concluded its analysis by stating that once it is certain that the container contains illicit drugs, the claim to privacy is lost, because the container becomes like an object that is physically within the plain view of the police.<sup>33</sup> Therefore, the subsequent reopening of the package was not a "search" within the fourth amendment and no warrant was required.<sup>34</sup>

The Florida Supreme Court found the factual circumstances in *Andreas* similar because both cases involved a prior legal search that resulted from the discovery of drugs in transit.<sup>35</sup> The court then applied the *Andreas* rationale and concluded that the Bernies had no expectation of privacy in the package, because the drugs had already been discovered from a prior legal search.<sup>36</sup> Furthermore, since the Bernies' package remained in the constructive custody of police,<sup>37</sup> there was no substantial likelihood that the contents had been changed.<sup>38</sup>

If *Bernie* simply involved a warrantless reopening of a previous lawfully seized container, then *Andreas* would undoubtedly be controlling. However, the factual differences between these two cases are explicit. *Andreas* dealt with a border search, while *Bernie* dealt with the discovery of drugs that broke open in transit.<sup>39</sup> In addition, *Andreas* involved a good faith attempt by officers to secure a warrant, while exigent circumstances forced a warrantless seizure.<sup>40</sup> *Bernie*, on the other hand, dealt with the validity of a search warrant that was pa-

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32. *Id.*

33. *Id.* at 772.

34. *Id.*

35. *Bernie*, 524 So. 2d 988, 992 (Fla. 1988).

36. *Id.*

37. *Id.* (The package remained in constructive custody of the police because the police had effected a controlled delivery of the resealed package to the Bernies' residence).

38. *Id.*

39. *Bernie*, 524 So. 2d at 997 (Kogan, J., dissenting).

40. *Id.* at 998.



tently defective.<sup>41</sup> Further, the validity of the *Bernie* warrant was based upon statutory construction, whereas "*Andreas* did not involve rules of statutory construction because no state or federal statute was implicated."<sup>42</sup> The most significant difference between the two cases is that *Bernie* dealt with a search of a private home, while *Andreas* involved a warrantless seizure under exigent circumstances in a hallway.<sup>43</sup>

Although in *Andreas* the police tried to obtain a search warrant for the apartment,<sup>44</sup> the police never searched the apartment and only effectuated a seizure outside the apartment.<sup>45</sup> In fact, the defendant's claim went only to the warrantless seizure of the container's contents.<sup>46</sup> He never even claimed that the warrantless seizure of the container from the hallway of his apartment following his arrest violated the fourth amendment.<sup>47</sup> Therefore, the only real issue before the Supreme Court was the warrantless reopening of the container, not a search of an apartment after a controlled delivery.

The Florida Supreme Court has translated the *Andreas* lack of expectation of privacy in a package delivered outside the home, to a lack of expectation of privacy inside a home.<sup>48</sup> For the Florida Supreme Court to equate a lack of expectation of privacy in a package to a lack of expectation of privacy in a private dwelling is dangerous reasoning. This is an overly broad application of a limited ruling set forth in *Andreas*. The Supreme Court never addressed this issue but confined its issue to a warrantless seizure of a container. The reasoning set forth by the Florida Supreme Court blatantly ignores the fourth amendment guarantee against unreasonable searches and seizures.

41. *Id.*

42. *Id.* at 999 (Barkett, J., dissenting).

43. *Id.*

44. *Illinois v. Andreas*, 463 U.S. 765, 767 (1983).

45. *Id.*

46. *Id.* at 771 n.4.

47. *Id.*

48. *Bernie v. State*, 524 So. 2d 988, 1000 (Fla. 1988) (Barkett, J., dissenting); Justice Kogan, also dissenting, examined the majority's interpretation of *Andreas* and stated:

Even assuming that the Bernies did not have a reasonable expectation of privacy in the package . . . there is no doubt that they did maintain a reasonable expectation of privacy in their home . . . It cannot even colorably be argued that *Andreas* allows the unwarranted entrance into a private residence. The court today, goes far beyond the holding of *Andreas* and further beyond what the constitution and the laws of this state will allow.

*Id.* at 998 (Kogan, J., dissenting).



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A serious erosion of the fourth amendment would occur if people lost their expectation of privacy in their home simply because they had no expectation of privacy in a package that was inside their home. Over fifty years ago, the Florida Supreme Court stated that "every man's house is his castle," which is guaranteed by the fourth amendment.<sup>49</sup> Today's poorly reasoned decision appears to be weakening the castle walls.

After concluding that *Andreas* was controlling authority for the case, the court then considered its effect on section 933.18(5).<sup>50</sup> The court apparently held the warrant valid under the statute based upon the Bernies' lack of expectation of privacy in the contraband package and also because the state already knew that drug laws have been violated.<sup>51</sup> Furthermore, the evidence and supporting affidavit indicated that the Bernies were expecting a package and knew its contents. From this foregoing analysis the court concluded:

[T]hat a reasonable construction of the emphasized words<sup>52</sup> in the statute allows a warrant to be issued when the evidence and supporting affidavit show that drugs have already been discovered through a legal search and seizure and are presently in the process of being transported to the designated residence which is being used as a drug drop. It is our view that this is not the type of in futuro allegation for a warrant that the legislature intended to prohibit by the statute.<sup>53</sup>

Since the court upheld the warrant under the statute, it found that the application of the good faith exception was unnecessary.<sup>54</sup>

By making a "reasonable construction" of section 933.18(5), the court ignores a sixty year practice of strictly construing search and seizure statutes.<sup>55</sup> The Florida Supreme Court announced the general

49. *Cooper v. State*, 143 So. 217 (Fla. 1932).

50. *Bernie*, 524 So. 2d at 992.

51. *Id.*

52. "Being violated therein" FLA. STAT. § 933.18(5) (1987).

53. *Bernie*, 524 So. 2d 988, 992 (Fla. 1988).

54. *Id.*

55. *Jackson v. State*, 87 Fla. 262, 99 So. 548 (1924) (The supreme court considered the validity of a search warrant issued under ch. 9321, acts 1923, where the prerequisite oath and affirmation was not made, and the "place or places to be searched" and the "things or things to be seized" were not particularly described as required by the constitution. *Id.* at 550. The court stated that "when searches are made pursuant to



rule of strictly construing search and seizure statutes in 1924.<sup>56</sup> Thus,

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affirmation required for it must conform strictly to the constitution and statutory provisions authorizing their issuance." *Id.* at 549); *Hart v. State*, 89 Fla. 202, 103 So. 633 (1925) (The court reversed the defendant's conviction of unlawfully possessing intoxicating liquor because the evidence was obtained by a unlawful search and seizure of the defendant's domicile. The court interpreted ch. 9321, acts 1923, according to the same rationale and reasoning set forth in *Jackson*); *Gildrie v. State*, 94 Fla. 134, 113 So. 704 (1927) (The court again followed the *Jackson* rationale and overturned a conviction for breaking and entering and receiving stolen goods. No description of the things to be seized was found in either the affidavit or the search warrant rendering them insufficient under section 22 of the Bill of Rights of the State of Florida and the statutes in such cases provided); *Pell v. State*, 97 Fla. 134, 122 So. 110 (1929) (The court found that an illegal search warrant was erroneously entered into evidence for the purposes of establishing what the murdered police officer was doing at the time of the shooting. The evidence showed the search warrant was not made out and issued in duplicate as required by ch. 9321, acts of 1923. The court followed *Gildrie*, and stated "the warrant must conform strictly to the requirements of the statute under which it is issued, otherwise it is void" *Pell*, 97 Fla. at 134, 122 So. at 110); *Cooper v. State*, 106 Fla. 254, 143 So. 217 (1932); *Carnagio v. State*, 106 Fla. 164, 143 So. 164 (1932); *see infra* note 71; *State ex rel. Wilson v. Quigg*, 154 Fla. 348, 17 So. 2d 697 (1944) (The court strictly construed FLA. STAT. §§ 933.02 and 933.18, which set forth the grounds for issuance of a search warrant, and found no authority for any judicial officer to make a search warrant returnable before a municipal court. Nor did the statutes allow for an alleged violation of a municipal ordinance to be grounds for the issuance of a search warrant); *Leveson v. State*, 138 So. 2d 361 (Fla. 3d Dist. Ct. App. 1962) (A search warrant for gambling paraphernalia was held invalid because the affidavit did not meet the minimum statutory and constitutional requirements. The court stated that "statutes authorizing seizures and search warrants should be strictly construed." *Id.* at 365); *Carter v. State*, 199 So. 2d 324 (Fla. 2d Dist. Ct. App. 1967) (Court reversed a conviction of lottery laws because the arrest and search was without a warrant. The court stated that statutory provisions regulating search warrants must be rigidly followed and cannot in any case be extended or enlarged beyond the permissive provisions); *Hesselrode v. State*, 369 So. 2d 348 (Fla. 2d Dist. Ct. App. 1979) (The court, strictly construing FLA. STAT. § 933.08, invalidated a search warrant because it was directed to one category of peace officers, but was executed by another category of police officers); *Hurt v. State*, 388 So. 2d 281 (Fla. 1st Dist. Ct. App. 1980) (Court stated that arresting officers must comply strictly with requirements of "knock and announce" provisions of section 901.19(1)); *State v. Tolmie*, 421 So. 2d 1087 (Fla. 4th Dist. Ct. App. 1982) (The court interpreted FLA. STAT. § 933.06, and held "that the failure of an affiant to subscribe to an affidavit for search warrant as required by statute invalidates a warrant based thereon." *Id.* at 1087. The court stated that "it is almost axiomatic that statutes and rules authorizing searches and seizures are strictly construed and affidavits and warrants issued pursuant to such authority must meticulously conform to statutory and constitutional provisions." *Id.* at 1088.) *See also Bernie*, 524 So. 2d at 998 (Kogan, J., dissenting).

<sup>56</sup> *Jackson v. State*, 87 Fla. 262, 264, 265, 99 So. 548, 549 (1924).



over six decades ago, the court explained that search and seizure laws must be strictly construed because the citizen is subjected to "intense feelings of resentment on account of its humiliating and degrading consequences."<sup>57</sup>

The court has evidently ignored the general rule of strictly construing search and seizure statutes when it liberally interpreted section 933.18(5). The statute specifically states that "no warrant shall issue . . . to search any private dwelling . . . unless . . . the law relating to narcotics or drug abuse is being violated therein."<sup>58</sup> Under general rules of statutory construction, this means that a judicial officer cannot issue a search warrant for a private dwelling unless the narcotic offense is PRESENTLY being violated in the dwelling to be searched.<sup>59</sup> As Justice Kogan, dissenting, stated about the majority's construction, "while this may be a reasonable construction of the statute, it is by no means a permissible one."<sup>60</sup>

Furthermore, the court simply does not address the later provision of section 933.18 which requires sworn proof by affidavit of some credible witness, who has reason to believe that the law relating to narcotics or drug abuse is being violated therein. The search warrant affidavit submitted by the detective was filled with mere expectation language.<sup>61</sup> Again, section 933.18 is quite specific in that it requires a credible witness to swear that the violation is occurring inside the private dwelling. The statute also requires the "affidavit to set forth the facts on which such reason for belief is based."<sup>62</sup>

By not addressing this last provision, the court further misinterpreted the statute. The mere expectational language found in the affidavit confirms that when the search warrant was issued, a drug violation had occurred but not in the Bernies' house. Therefore, the warrant should have never been issued because there was no present violation in the Bernies' house. The court's explanation for this deviation from general statutory construction was apparently based on the belief that the legislature did not intend to prohibit this type of warrant.<sup>63</sup> The legislative history of section 933.18(5), however, tends to provide a contrary

57. *Id.* at 264, 99 So. at 549.

58. FLA. STAT. § 933.18(5) (1983).

59. *See State v. Bernie*, 472 So. 2d 1243, 1245 (Fla. 2d Dist. Ct. App. 1985).

60. *Bernie*, 524 So. 2d 988, 998-99 (Fla. 1988) (Kogan, J., dissenting).

61. *See supra* note 8.

62. FLA. STAT. § 933.18 (1983).

63. *Bernie*, 524 So. 2d at 992.



view.

The legislative history<sup>64</sup> of section 933.18(5) dates back to 1923, where the statute dealt with illegal liquor during prohibition.<sup>65</sup> Although it was not until 1957 that a provision for narcotics was added, the statute has remained virtually identical to the present day statute.<sup>66</sup>

In *Watson v. Holland*,<sup>67</sup> the Florida Supreme Court held that the "intent of a valid statute is the law, and this is ascertained by a consideration of the language and purpose of the enactment."<sup>68</sup> The legislature could not have been more explicit by using the language, "BEING VIOLATED THEREIN" and requiring a sworn affidavit to that fact. A present violation in the dwelling is a prerequisite to the issuance of the search warrant. There is nothing ambiguous about this language.

The court in *Watson* also stated that "in seeking legislative intent by tracing the history of legislation, it is proper to consider acts passed at prior or subsequent sessions including those repealed, as well as those passed at the same session."<sup>69</sup> Since the Florida legislature has consistently required a present violation in the dwelling, and has amended, not repealed, the statute minimally over the last sixty-five years,<sup>70</sup> this casts serious doubts on whether the legislature would ac-

64. History — s.19, ch. 9321, 1923; s.2, ch. 10273, 1925; CGL 8513; s.1 ch. 57-418; s.1 ch. 67-348; s.1 ch. 69-18; s.1 ch. 74-126; s.1 ch. 78-345; s.1 ch. 86-93.

65. 1923 Fla. Laws 9321.19

66. The 1923 statute provided in part:

No search warrant shall issue under this act or under any other law of this state to search any private dwelling occupied as such unless it IS BEING USED for the unlawful sale or manufacturing of intoxicating liquor, or stolen or embezzled property is CONTAINED THEREIN . . . No warrant for the search of any private dwelling shall be issued except upon sworn proof by affidavit of some CREDIBLE WITNESS that he or she has personal knowledge that the laws prohibiting the unlawful sale and manufacturing of liquor ARE BEING VIOLATED IN SUCH DWELLING . . . (emphasis added).

1923 Fla. Laws 9321.19

67. *Watson v. Holland*, 155 Fla. 342, 20 So. 2d 388 (1944) (In *Watson*, the court considered the history, purpose and intent of the legislature to determine whether the leasing of lands and water bottoms for the highly specialized purpose of producing oil, gas and other minerals as contemplated by FLA. STAT. § 270.28 (1941), was separate and distinct from the sale, conveyance and disposition of the fee simple title to lands contemplated in FLA. STAT. § 270.07. *Id.* at 393).

68. *Id.* See also Petitioner's Reply Brief on the Merits at 3, 4, *Bernie v. State*, 524 So. 2d 988 (Fla. 1988) (No. 67-535).

69. *Watson*, 155 Fla. at 351, 20 So. 2d at 393.

70. See also Reply Brief at 4, *Bernie*, (No. 67-535).



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cept or approve of the court's reasonable construction of the statute.<sup>71</sup>

The purpose behind strictly construing search and seizure statutes like section 933.18(5) is to protect the citizens from unreasonable searches and seizures and to prevent misconduct by overzealous police officers.<sup>72</sup> Until the Florida Legislature amends section 933.18(5) to allow for anticipatory warrants, the statute must be strictly construed according to general statutory construction. As Justice Kogan stated in his dissent, "to allow any variance from these express legislative mandates, would not only flaunt legislative authority to regulate such conduct, but actually encourage misconduct."<sup>73</sup>

When the Florida Supreme Court decided *Bernie*, it approved of the district court's result without even addressing the major issues presented by the lower court. As previously discussed, the district court found the affidavit facially invalid but upheld the search warrant based upon the good faith exception to the warrant requirement. The Florida Supreme Court upheld the warrant on a "reasonable construction" of section 933.18(5) and *Andreas*. Therefore, in his dissent, Justice Kogan specifically addressed the district court's rationale because the majority did not, and disagreed with the district court's interpretation of *Leon*.<sup>74</sup>

71.

In fact, the court has also overlooked its own decisions in 1932, in which it interpreted the earlier version of section 933.18. In *Cooper v. State*, 106 Fla. 254, 143 So. 217 (Fla. 1932) the court held that an affidavit for a liquor search warrant was insufficient because it failed to set forth facts on which the affiant's belief was based. The court examined the statute and found that the affidavit provision meant "that the person making the affidavit must therein swear that he or she, has reason to believe that the dwelling is being used unlawfully as stated in the affidavit." *Id.* at 258, 143 So. at 218. This court reached the same decision in *Carnagio v. State*, 106 Fla. 222, 143 So. 164 (Fla. 1932), where the court held that a search warrant for gambling appliances was invalid because the affidavit failed to set forth facts upon which the belief was based.

Reply Brief at 4, *Bernie*, (No. 67-535).

72. See also *Bernie v. State*, 524 So. 2d 988, 998 (Fla. 1988) (Kogan, J., dissenting).

73. *Id.*

74. Kogan stated that the *Leon* decision should be limited on its facts to prevent the exception from swallowing up the rule. *Leon* was distinguished because it involved a questionable probable cause determination, whereas the present case involved a warrant and affidavit that failed to meet the clear and express requirement of section 933.18. Justice Kogan believed that the *Leon* decision should be limited on its facts to prevent the exception from swallowing up the rule. *Id.* at 996-97.

Justice Kogan suggested that the court adopt an objective good faith standard that



Finally, the court has failed to address the current validity of *Gerardi v. State*,<sup>75</sup> which held that section 933.18(5) not only prohibited the issuance of a search warrant to search a private dwelling for violations of narcotic or drug abuse laws unless such law is currently being violated therein, but it expressly prohibited it.<sup>76</sup> It is most surprising that the Florida Supreme Court did not comment on *Gerardi* because the two cases are factually identical. In *Gerardi*, the defendant was charged with possession of hashish and drug paraphernalia, that was seized pursuant to a prospective search warrant. A deputy sheriff swore in an affidavit for a search warrant, that in the presence customs officials and a postal inspector, they had opened a package which bore a customs declaration sticker. It described the contents as a bottle of wine which had been sent from the Netherlands. The package was addressed to the defendant and his wife, and was awaiting delivery.

The contents of the package revealed a ceramic bottle that contained hashish inside. After tests confirmed the narcotics, the bottle was marked with fluorescent powder and repackaged. The federal agents and the deputy sheriff then agreed that the postal inspector would retain custody of the package until a controlled delivery could be executed. After the delivery to the addressee, but before execution of the search warrant, the deputy sheriff would contact the issuing judge by telephone to provide him "with confirming information as to the procedure followed on transmittal and receipt of said package."<sup>77</sup>

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requires police officers to have reasonable knowledge of statutes regulating search and seizure. "To charge police officers knowledge of statutory search and seizure law gives police the incentive to educate themselves." Justice Kogan did not require that police become legal scholars, but they should understand the basic principles of search and seizure law embodied in chapter 933. *Id.* Officers should be aware that section 933.18(5) requires that affidavits for search warrants must allege present violations of narcotic laws. *Id.* In his conclusion, Justice Kogan applied the cost-benefits analysis of *Leon* to the case at bar:

The deterrence against police misconduct, and the incentive to police officers to educate themselves with regard to express search warrant regulations is balanced against the cost of suppressing trustworthy, physical evidence. The failure to comply with clear, express, and established statutory provisions should render the warrant and the ensuing search invalid. The value of deterring police from misconduct and ignorance of statutory regulation outweighs the cost of suppressing evidence.

*Id.* at 997.

75. *Gerardi v. State*, 307 So. 2d 853 (Fla. 4th Dist. Ct. App. 1975).

76. *Id.*

77. *Id.* at 854.



After the judge received the deputy sheriff's affidavits, he signed a search warrant that authorized the sheriff's department to enter and search the defendant's house to seize the package of hashish. About an hour after receiving the search warrant, the deputy sheriff telephoned the judge and confirmed that the hashish had been delivered to and received by an occupant of the defendant's house. Immediately after delivery, the police entered the defendant's house, and seized the package of hashish and some drug paraphernalia.

The *Gerardi* court began its analysis in the same way the *Bernie* court did. It examined similar jurisdictions that allowed the use of prospective warrants, and distinguished those cases from the present. The court stated that the approval of such warrants in other jurisdictions resulted from a finding that there was no constitutional or statutory provision proscribing the issuance of a search warrant under conditions similar to those in the present case.<sup>78</sup> The court then stated that Florida is different from the other states, because section 933.18(5) requires a present violation occurring in the home prior to the issuance of a search warrant.<sup>79</sup> Since the court was obligated to strictly construe section 933.18(5), it was constrained to hold that the affidavits did not meet the statutory requirements, and therefore, were insufficient to support the issuance of the search warrant.<sup>80</sup>

The *Gerardi* decision was correctly decided because although it accepted the general validity of anticipatory warrants, it recognized that Florida had a statutory impediment in section 933.18(5). The courts that had permitted anticipatory warrants had done so without any statutory or constitutional prohibition. Even though the court may not have liked the result,<sup>81</sup> it still was compelled to apply proper statutory construction.

*Bernie* and *Gerardi* are so factually identical that the *Bernie* court should have decided the issues according to *Gerardi*. However, the court did not, nor did it comment on the validity of *Gerardi*. It would be a reasonable inference from the court's liberal interpretation of section 933.18(5) that *Gerardi* is no longer valid law, but it would only be speculation since the court failed to address the issue.<sup>82</sup> This undoubt-

78. *Id.* at 855.

79. *Id.*

80. *Id.*

81. In expressing its opinion, the court used the words: "we are constrained to hold" in reference to strictly construing section 933.18(5). *Id.* at 855.

82. See also *Bernie v. State*, 524 So. 2d 988, 998-99 (Fla. 1988) (Kogan, J.,



edly confuses the law further because the lower courts have no clear signal on the validity of *Gerardi*.

## ANTICIPATORY SEARCH WARRANTS IN OTHER JURISDICTIONS

Although the Supreme Court has not specifically considered this type of anticipatory warrant, it has upheld the issuance of search warrants for the seizure of oral communications.<sup>83</sup> Search warrants for oral communications, contemplate the use of anticipatory warrants because the seizure of a conversation could only take place sometime in the future.<sup>84</sup> Other state and federal jurisdictions have generally upheld these warrants on either constitutional or statutory grounds.<sup>85</sup>

The jurisdictions that have decided cases upon statutory grounds, have usually dealt with statutes that were reasonably susceptible to a liberal construction.<sup>86</sup> Florida's situation is different because of the specific language found in section 933.18(5).<sup>87</sup>

The majority of jurisdictions<sup>88</sup> that have decided anticipatory or prospective search warrants on constitutional grounds, have done so by interpreting the fourth amendment.<sup>89</sup> A central issue confronted by

dissenting).

83. See *Katz v. United States*, 389 U.S. 347 (1967) (In *Katz*, the Court held that a search warrant could be issued for the seizure of oral communications. However, the surveillance must be so narrowly circumscribed that a judge was properly informed of the need for such investigation, the basis of which it would proceed, and be clearly apprised of the exact intrusion it would entail. *Id.* at 354); *Berger v. New York*, 388 U.S. 41 (1967).

84. *Accord Alvidres v. Superior Court*, 12 Cal. App. 3d 575, 582, 90 Cal. Rptr 682, 686; Note, *Criminal Procedure-Search and Seizure - Prospective Search Warrants*, 19 WAYNE L. REV. 1339, 1347 (1973) [hereinafter Note, *Criminal Procedure*].

85. See *supra* note 3 and *infra* note 117.

86. See *People v. Glen*, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972) and *infra* note 117.

87. See FLA. STAT. § 933.18(5) (1983).

88. See *United States ex rel. Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969); *State v. Berge*, 130 Ariz. 135, 634 P.2d 947 (1981); *Alvidres v. Superior Court*, 12 Cal. 3d 575, 90 Cal. Rptr. 682 (1970); *People v. Glen*, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972).

89. U.S. CONST. amend. IV 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



these courts has been whether there was sufficient probable cause, when the prospective warrant was issued, to believe that a crime had been committed or would be committed in the future.<sup>90</sup>

The New York Court of Appeals decision in *People v. Glen*,<sup>91</sup> is probably the leading case on anticipatory search warrants.<sup>92</sup> In *Glen*, the court held that a search warrant may be issued prior to the imminent or scheduled arrival of seizable property, designated in a warrant, on the premises or person to be searched.<sup>93</sup> The court found no constitutional bar to anticipatory warrants because the fourth amendment did not impose any time requirement.<sup>94</sup> The court concluded "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."<sup>95</sup> *Glen* commended the officers for their prudence in obtaining a warrant and emphasized that the warrant procedure should be encouraged.<sup>96</sup> However, the court was concerned with the likelihood that such a warrant could be executed prematurely.<sup>97</sup>

persons to things to be seized.

90. For a more detailed discussion of fourth amendment issues, see also Note, *Criminal Procedure*, *supra* note 84 at 1339 & Note, *Prospective Search Warrants in Arizona: The Reasonableness of a Search Warrant Based on Evidence of a Probable Future Crime*, 25 ARIZ. L. REV. 539 (1982) [hereinafter Note, *Prospective Search*].

91. 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972).

92. J. HALL, SEARCH & SEIZURE § 5:14 (1982).

93. *Glen*, 30 N.Y.2d at 255, 282 N.E.2d at 615, 331 N.Y.S.2d at 658. The *Glen* case was actually a review of two unrelated possession prosecutions that were consolidated. One case involved an overseas package of marijuana that was discovered by a customs inspector in San Francisco. The package was resealed and sent to Buffalo, where it was reexamined by postal authorities. A search warrant was issued for the defendant's premises that did not specify a particular time for execution; although the statutory form warrant directs immediate execution. After delivery, the defendant was arrested. *Id.* at 256, 257, 282 N.E.2d at 615, 616, 331 N.Y.S.2d at 659.

The other case involved a package of marijuana that was scheduled to arrive at a bus depot. A warrant was issued based upon information of a reliable informant. Upon its arrival, the package was inspected by sheriff's officers and returned to the depot for delivery to the defendant. The defendant accepted delivery and was arrested. *Id.*

94. *Id.* at 258, 282 N.E. at 617, 331 N.Y.S.2d at 660; see also Note, *Criminal Procedure*, *supra* note 84 at 1339, 1342.

95. 30 N.Y.2d at 259, 282 N.E.2d at 617, 331 N.Y.S.2d at 661.

96. *Id.* at 258, 282 N.E.2d at 617, 331 N.Y.S.2d at 660.

97. "[W]here there is no present possession, the supporting evidence for the prospective warrant must be strong that the particular possession of the particular property will occur and . . . will result in the possession at the time and place specified." *Id.* at 259, 282 N.E.2d at 617, 331 N.Y.S.2d at 661.



*Glen* also found that a former statute which commanded the serving officer to search "forthwith,"<sup>98</sup> did not provide a statutory impediment to the prospective warrant.<sup>99</sup> Since the command to execute "forthwith" had been defined to require reasonable promptness, and therefore allowed a "reasonable delay" under the circumstances of this case.<sup>100</sup> Additionally, another statute which required an officer to execute a warrant and return it within ten days after its date,<sup>101</sup> suggested that "forthwith" execution did not mean immediately. Therefore, the court concluded that the requirement to execute the warrant "forthwith" had not been violated.<sup>102</sup>

In *Alvidres v. Superior Court*,<sup>103</sup> the California Court of Appeals upheld a search warrant for a residence that was issued prior to the actual arrival of the contraband on the premises.<sup>104</sup> The *Alvidres* rationale was predicated on the exclusionary rule,<sup>105</sup> which would encourage the use of warrants by law enforcement officials. Law enforcement officials are confronted with the dilemma of losing time in obtaining a search warrant while attempting to comply with the court enunciated requirements for a "reasonable" search and seizure.<sup>106</sup> Since law enforcement officers are often required to act quickly, this demands that courts make every effort to assist law enforcement in complying with the edicts that the courts themselves have issued.<sup>107</sup>

98. *Id.* at 260, 282 N.E.2d at 618, 331 N.Y.S.2d at 662; N.Y. CODE CRIM. PROC. § 796 (McKinney Supp. 1971).

99. *People v. Glen*, 30 N.Y.2d 252, 260, 282 N.E.2d 614, 618, 331 N.Y.S.2d 656, 662.

100. *Id.*

101. *Id.* at 261, 282 N.E.2d at 618, 331 N.Y.S.2d at 663, N.Y. CODE CRIM. PROC. § 802 (McKinney Supp. 1971).

102. *Glen*, at 261, 282 N.E.2d at 618, 331 N.Y.S.2d at 663.

103. 12 Cal. App. 3d 575, 90 Cal. Rptr. 682 (1970).

104. A parcel that contained marijuana was opened by federal customs agents at the San Francisco International Airport, which was later forwarded to postal authorities for delivery. A sample of the suspected marijuana was confirmed by a crime laboratory. Local officers obtained a search warrant for the defendant's residence prior to the delivery to the parcel. Marijuana was seized at the indicated address in the search warrant. *Id.* at 577-78, 90 Cal. Rptr. at 683-84.

105. *Id.* at 581, 90 Cal. Rptr. at 685.

106. *Id.*

107. The district court stated:

We must ask ourselves whether the objective of the rule is better served by permitting officers under circumstances similar to this case at bar to obtain a warrant in advance to the delivery of the narcotic or by forcing them to go to the scene without a warrant and there make a decision at the risk of



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*Alvidres* also relied on *Katz v. United States*<sup>108</sup> and *Berger v. New York*,<sup>109</sup> where the Supreme Court indicated that it could be constitutional to obtain a search warrant for the seizure of oral communications by the use of electronic surveillance.<sup>110</sup> The court found support in these cases because a warrant for the seizure of oral communications, by its very nature, would have to be issued in advance of the time that the subject matter to be seized was present on the premises.<sup>111</sup> Therefore, "a warrant directing the seizing of a conversation could only be directed to words which would not be in existence until vocalized by the participants thereto."<sup>112</sup>

Additionally, the court found *United States ex rel. Beal v. Skaff*,<sup>113</sup> to be squarely on point. In *Beal*, the court upheld the issuance of a search warrant for a residence, even though the affidavit only alleged that the marijuana would be on the premises to be searched at a specific time.<sup>114</sup> The court was concerned that the premature execution of the warrant before the commission of the offense would lack an essential element of judicial control.<sup>115</sup> The *Beal* court upheld the warrant because, under the circumstances of this case, there was probable

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being second-guessed by the judiciary if they are successful in recovering evidence or contraband. We believe that the achievement of the goals which our high court had in mind in adopting the exclusionary evidence rule is best attained by permitting officers to seek warrants in advance when they can clearly demonstrate that their right to search will exist within a reasonable time in the future. Nowhere in either the federal or state Constitutions, nor in the statutes of California, is there any language which would appear to prohibit the issuance of a warrant to search at a future time.

*Id.* at 581, 90 Cal. Rptr. at 686.

108. 389 U.S. 347 (1967).

109. 388 U.S. 41 (1967).

110. *Alvidres v. Superior Court*, 12 Cal. App. 3d 575, 582, 90 Cal. Rptr. 682, 686 (1970).

111. *Id.* at 582, 90 Cal. Rptr. at 686.

112. *Id.*

113. 418 F.2d 430 (7th Cir. 1969).

114. In *Beal*, a search warrant for marijuana was issued at 12:15 P.M. while the package was not scheduled to arrive until 12:34 P.M. The defendant claimed that since the affidavit only alleged that the marijuana "will be" on the premises it violated the fourth amendment because there were no facts sufficient to support a belief that an offense "has been or is being committed." *Id.* at 432.

115. "[T]he requirement that probable cause exist to believe that execution will not precede the commission of the crime or possession of the goods to be seized." *Id.* at



cause to believe that the package would be delivered to the specific residence and that the warrant would not be executed prior to the delivery.<sup>116</sup>

Other state and federal jurisdictions<sup>117</sup> have upheld anticipatory

116. *Beal*, 418 F.2d at 433.

117. *See United States v. Feldman*, 366 F. Supp 356 (D. Hawaii 1973) (The court upheld the anticipatory warrant where there was no unreasonable passages of time between the issuance and delivery or between deliver execution of the warrant. The entrapment defense was rejected); *United States v. Valenzuela*, 596 F.2d 824 (9th Cir.) *cert denied*, 441 U.S. 965 (1979) (The court utilized a "commonsense approach" to interpret search warrants and found it permissible to infer probable cause that heroin would be found at the time of searching the residence); *United States v. Goff*, 681 F.2d 1238 (9th Cir. 1982) (The anticipatory warrant for search of defendant at airport was valid because the person to be searched would arrive within the district within a reasonable time and that the warrant could not be executed until the arrival); *United States v. Hendricks*, 743 F.2d 653 (9th Cir. 1984) (The prospective warrant was invalid for a lack of probable cause, however, the evidence was admissible under the *Leon* decision); *Johnson v. State*, 617 P.2d 1117 (Alaska 1980) (For anticipatory warrants to be valid, there must be probable cause to believe that items to be seized will be at the place to be searched at the time the warrant is executed, i.e., the warrant will not be executed prematurely. Such warrants "are not precluded by statutory authority ALASKA STAT. § 12.35.020(3) (1984) which requires only reasonable belief of possession of the item for issuance of the warrant, without, specifying that possession must be contemporaneous with the warrant, as distinct from the execution of the warrant"); *State v. Gutman*, 670 P.2d 1166 (Alaska Ct. App. 1983) (The court upheld an anticipatory warrant because there was probable cause to believe that the defendant would be involved in a cocaine sale, that his residence would be linked to the sale, and that it would occur in the immediate future. The court distinguished cases that held such warrants invalid based upon mere speculation); *Commonwealth v. Soares*, 384 Mass. 149, 424 N.E.2d 221 (1981) (The court upheld anticipatory warrants and liberally construed a warrant statute that required that objects of the search "are concealed" in the place to be searched. However, the court found reinforcement by the legislature's disclaimer of any intent to impair the powers of search and seizure existing "under common law"); *State v. Mier*, 147 N.J. Super. 17, 370 A.2d 515 (N.J. Super. Ct. App. Div., 1977) (The test of whether an anticipatory warrant is valid is "whether the search is reasonable under the circumstances in view of the probable cause that a crime is being committed, as demonstrated by the proofs underlying the issuance of the warrant." This area of law should be construed to encourage police to resort to warrants. The entrapment defense was found to be without merit). *See also United States v. Outland*, 476 F.2d 581 (6th Cir. 1973); *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973); *United States v. Foster*, 711 F.2d 871 (9th Cir.) *cert. denied*, 465 U.S. 1103 (1983). *Contra United States v. Roberts*, 333 F. Supp. 786, 787 (E.D. Tenn. 1971) (Search warrant would not be issued upon an affidavit that only recited an anticipation of a future offense); *United States v. Rundle*, 327 F.2d 153, 162-63 (3d Cir. 1964) (Insufficient probable cause because no showing that the law was about to be violated); *State v. Vitale*, 23 Ariz. App. 37, 530 P.2d 394 (1975) (No probable cause to



warrants on similar grounds as the New York and California<sup>118</sup> courts. However, the Arizona Supreme Court has reached a contrary conclusion.

In *State v. Berge*,<sup>119</sup> the Arizona Supreme Court held that a search warrant based upon future acts, that could only come into being by actions of law enforcement officers, violated the reasonableness requirement of the fourth amendment.<sup>120</sup> In *Berge*, narcotic detectives received a tip from a confidential informant that the defendant was

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support the anticipatory warrant because it was purely speculative that a crime would be committed in the future).

118. For other California decisions see *People v. Sanchez*, 24 Cal. App. 3d 664, 101 Cal. Rptr. 193 (1974) (The defendant argued that the prospective warrant was invalid because the affiants did not indicate that heroin was to be found at the place to be searched, when the warrant was issued on December 12th; rather it was only expected to be present on December 14th or 15th. *Id.* at 679, 101 Cal. Rptr. at 203. The court rejected the argument based upon *Alivdres*); *People v. Superior Court*, 27 Cal. App. 3d 404, 103 Cal. Rptr. 874 (1972) (The directive to search for "other hashish, marijuana, narcotics or narcotic paraphernalia [sic]" in a prospective search warrant for the premises of a consignee, was inadequate to justify a further search because of lack of probable cause in the affidavit or because of overbreadth. However, the directive to search for correspondence relating to smuggling was sustained by probable cause, and was not overbroad if construed as relating to the known package that was subject to the controlled delivery. *Id.* at 418, 103 Cal. Rptr. at 883.); *People v. Sloss*, 34 Cal. App. 3d 74, 109 Cal. Rptr. 583 (1973) (The court upheld a prospective search warrant that authorized a search for "any paraphernalia used to consume or inject marijuana and any material used to package marijuana and certain correspondence," in addition to a parcel of marijuana scheduled for delivery. *Id.* at 82, 83, Cal. Rptr. at 588. The court reasoned that the "marijuana paraphernalia and the correspondence were particularly described, placing a meaningful restriction on the things to be seized; and the warrant was not unduly general." *Id.*); *People v. Shapiro*, 37 Cal. App. 3d 1038, 113 Cal. Rptr. 54 (1974) (A prospective warrant was not held invalid because it was based upon an affidavit which established a future, rather than a present probable cause to search. *Id.* at 1042, 113 Cal. Rptr. at 56. The court also noted that the controlled delivery in this case was proper and in no way constituted unlawful entrapment. *Id.* at 1043, 113 Cal. Rptr. at 57). See also *People v. Duncan*, 40 Cal. App. 3d 940, 115 Cal. Rptr. 699 (1974) (The court suggested that a search should not be conducted until the contraband has been delivered).

119. 130 Ariz. 135, 634 P.2d 947 (1981).

120. *Id.* For an more extensive analysis of the *Berge* opinion see Note, *Prospective Search*, *supra* note 90 at 539 (It was suggested that the *Berge* opinion has not settled the issue of "whether evidence that a crime probably will be committed in the future can furnish authority for issuance of a search warrant." *Id.* at 547. *Berge* could be read broadly in conjunction with *Vitale*, to prohibit anticipatory warrants. However, it should be read narrowly, thus restricting its application to the same facts. Thus, in a different factual situation, a prospective warrant may be valid. *Id.*)



receiving quantities of marijuana via UPS. A valid search warrant was issued for a package with the defendant's return address, that had been discovered by drug sniffing dog. The marijuana that was discovered, was repackaged and marked with floursecent powder, and prepared for a controlled delivery. A second search warrant for the defendant's residence was issued while the police retained control of the package. The search warrant was then executed after the delivery of the package. Although the package was not recovered, a small quantity of marijuana was found on the premises.

The court explained that "a search warrant may not be issued unless the issuing magistrate has probable cause to believe a crime was committed or is in the process of being committed."<sup>121</sup> Since the package was in the possession or control of the police at the time the warrant was issued, there was no crime being committed at that time. The police have only provided the defendant with the means to commit the crime. "The question is not one of an anticipatory warrant, but whether there was reasonable grounds to believe a crime was being committed."<sup>122</sup> In deciding *Berge*, the court relied upon *State v. Vitale*,<sup>123</sup> while distinguishing one of its own opinions, *State v. Cox*.<sup>124</sup>

In *Cox*, the Arizona Supreme Court upheld an anticipatory warrant to search an automobile, because there was probable cause to believe that the defendant had committed a crime, at the time the warrant was issued.<sup>125</sup> In this case, a prospective search warrant for the defendant's car, had been issued on the basis of information provided by a confidential informant. The defendant would be traveling into Coconino County, Arizona, with an amount of marijuana in his car. The court in Coconino County had issued the warrant prior to the defendant's arrival in the county. Upon the defendant's arrival, he was stopped and the warrant was executed. Court reasoned that as long as the magistrate was fully and fairly apprised of the facts, it was reasonable to issue a prospective warrant for a crime that is in progress or which is reasonable to assume will be committed in the near future.<sup>126</sup>

In *Vitale*, the court invalidated a prospective warrant, because at the time it was issued, no crime had been committed and it was only a

121. *Berge*, 130 Ariz. at 136, 634 P.2d at 948.

122. *Id.* at 138, 634 P.2d at 950.

123. 23 Ariz. App. 37, 530 P.2d 394 (1975).

124. 110 Ariz. 603, 522 P.2d 29 (1974).

125. *Id.*

126. *Id.* at 608, 522 P.2d at 34.



matter of pure speculation that a crime would be committed in the future.<sup>127</sup> In this case, police suspected that Vitale was operating as a "fence" in receiving stolen property, so they had an informant fitted with a listening device, sell the defendant a television set that was represented as being stolen. The police obtained a search warrant based on these facts, and executed it after the defendant purchased the allegedly stolen television set. The court found that section 13-3912 of the Arizona Revised Statutes,<sup>128</sup> "clearly refers to seizing property where the criminal offense has already occurred."<sup>129</sup> Therefore, there was no probable cause to believe that a crime was committed or was in progress because it was mere speculation that a crime would occur. Furthermore, the issuing magistrate knew that the alleged stolen property was not on the premises when the warrant was issued.

The *Berge* court found the circumstances in its case more akin to *Vitale*, than to *Cox*<sup>130</sup> because the package in the present case was in the control of the police when the search warrant was issued. Therefore, no crime had been committed in this case, when the warrant was issued, just like in *Vitale*. *Cox* was distinguished because the defendant was in possession of marijuana when the prospective warrant had been issued. Therefore, a crime had been committed when the search warrant was issued.

In *Berge*, the court invalidated a warrant based upon future acts because they could only come into existence by actions of law enforcement officers. This position is contrary to the New York and California courts, which focused upon the officers' prudence in obtaining search warrants. These courts were concerned with premature execution of the

127. 23 Ariz. App. 37, 530 P.2d 394 (1975).

128. ARIZ. REV. STAT. ANN. § 13-3912 (1978) (formerly § 13-1442) specifies that a search warrant may be issued on any of the following grounds:

1. When the property to be seized was stolen or embezzled.
2. When the property or things to be seized were used as a means of committing a public offense.
3. When the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it being discovered.
4. When property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular persons has committed the public offense . . . .

129. *Vitale*, 23 Ariz. App. at 40, 530 P.2d at 397.

130. *State v. Berge*, 130 Ariz. 135, 137, 634 P.2d 947, 949 (1981).



warrant, not the fact that the officers were acting improperly by effecting controlled deliveries. The Florida decision in *Gerardi*, found that an anticipatory warrant was invalid because of a statute, not because the officers were creating the crime. Likewise, the focus in *Bernie* was not on the officers' conduct. *Bernie* judicially sanctioned the use of anticipatory warrants in Florida while ignoring existing present statutory impediments.

## CONCLUSION

In *Bernie v. State*, the highest court in Florida has upheld the use of anticipatory warrants to search dwellings for narcotics based upon inadequate reasoning. The court upheld the warrant under *Andreas*, which is factually dissimilar, because it dealt with a warrantless seizure under exigent circumstances, with no applicable statute. The court has deviated from the traditional rule of strictly construing penal statutes by liberally construing section 933.18(5), without providing any substantive reason for the change. The court also approved of the district court's result on other grounds, yet did not comment on the lower's rationale. Furthermore, the court has failed to comment upon the validity of *Gerardi*, which dictates that under present Florida statutory law, anticipatory warrants are invalid. The majority had a chance to change its opinion when the case went up on rehearing but declined to do so.<sup>131</sup>

This opinion will probably confuse the lower courts because it allows for anticipatory searches on the basis of *Andreas*, a federal case. It also ignores a statute that facially prohibits this type of search. The lower courts will no doubt question *Bernie's* value on its poor reasoning. This decision may also lead to abuse of discretion by eager law enforcement officials because the court did not specify any guidelines on the execution of the warrants. The premature execution of anticipatory warrants was a primary concern in the New York and California courts. The majority had the opportunity to at least provide some specific guidelines to curb this potential problem, but did not.

This author believes that law enforcement officials should have the advantage of using anticipatory search warrants in Florida to combat the drug problem. However, under the present law, anticipatory warrants are allowed under a poorly reasoned opinion. The Florida Legislature should take the initiative and rectify this situation by amending section 933.18(5) to allow anticipatory warrants. The legislature should

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131. A rehearing was denied March 18, 1988.



place constitutional safeguards in the statute by requiring that the warrant would not be executed prior to a controlled delivery and that the issuing judicial officer must be satisfied that the warrant would be executed within a reasonable time.<sup>132</sup> This way, law enforcement officials can utilize anticipatory warrants under a clear mandate from the State of Florida.<sup>133</sup>

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132. See also *United States ex rel. Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969); *Alvidres v. Superior Court*, 12 Cal. App. 3d 575, 90 Cal. Rptr. 682 (1970); *People v. Glen*, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972).

133. See also Note, *Criminal Procedure*, *supra* note 84 at 1339 where it was suggested that a proper case for a prospective warrant would occur when:

- 1) Probable cause exists to support a belief that an offense will occur sometime in the future. The standard for probable cause should be higher in a prospective warrant situation than where warrants are based upon past or present conduct. It is suggested that a "more probable than not" standard be utilized rather than the more lenient "reasonable grounds" standard.
- 2) The time of delivery of the seizable property can be accurately estimated.
- 3) The search warrant prohibits execution until it is reasonably certain that delivery has occurred.
- 4) There has been no unconstitutional interference with the defendant's property prior to issuance of the warrant.

*Id.* at 1348.