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# SUPREME COURT OF THE UNITED STATES

# No. 04–1414

# UNITED STATES, PETITIONER v. JEFFREY GRUBBS

# ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# [March 21, 2006]

# JUSTICE SCALIA delivered the opinion of the Court.

Federal law enforcement officers obtained a search warrant for respondent's house on the basis of an affidavit explaining that the warrant would be executed only after a controlled delivery of contraband to that location. We address two challenges to the constitutionality of this anticipatory warrant.

# Ι

Respondent Jeffrey Grubbs purchased a videotape containing child pornography from a Web site operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of a package containing the videotape to Grubbs' residence. A postal inspector submitted a search warrant application to a Magistrate Judge for the Eastern District of California, accompanied by an affidavit describing the proposed operation in detail. The affidavit stated:

"Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence . . . At that time, and not before, this search warrant will be executed by me and other United

States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command." App. to Pet. for Cert. 72a.

In addition to describing this triggering condition, the affidavit referred to two attachments, which described Grubbs' residence and the items officers would seize. These attachments, but not the body of the affidavit, were incorporated into the requested warrant. The affidavit concluded:

"Based upon the foregoing facts, I respectfully submit there exists probable cause to believe that the items set forth in Attachment B to this affidavit and the search warrant, will be found [at Grubbs' residence], which residence is further described at Attachment A." *Ibid*.

The Magistrate Judge issued the warrant as requested. Two days later, an undercover postal inspector delivered the package. Grubbs' wife signed for it and took the unopened package inside. The inspectors detained Grubbs as he left his home a few minutes later, then entered the house and commenced the search. Roughly 30 minutes into the search, Grubbs was provided with a copy of the warrant, which included both attachments but not the supporting affidavit that explained when the warrant would be executed. Grubbs consented to interrogation by the postal inspectors and admitted ordering the videotape. He was placed under arrest, and various items were seized, including the videotape.

A grand jury for the Eastern District of California indicted Grubbs on one count of receiving a visual depiction of a minor engaged in sexually explicit conduct. See 18 U. S. C. §2252(a)(2). He moved to suppress the evidence seized during the search of his residence, arguing as relevant here that the warrant was invalid because it failed to

list the triggering condition. After an evidentiary hearing, the District Court denied the motion. Grubbs pleaded guilty, but reserved his right to appeal the denial of his motion to suppress.

The Court of Appeals for the Ninth Circuit reversed. 377 F. 3d 1072, amended, 389 F. 3d 1306 (2004). Relying on Circuit precedent, it held that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." 377 F. 3d, at 1077-1078 (citing United States v. Hotal, 143 F. 3d 1223, 1226 (CA9 1998)). An anticipatory warrant defective for that reason may be "cur[ed]" if the conditions precedent are set forth in an affidavit that is incorporated in the warrant and "presented to the person whose property is being searched." 377 F. 3d, at 1079. Because the postal inspectors "failed to present the affidavit—the only document in which the triggering conditions were listed"—to Grubbs or his wife, the "warrant was ... inoperative, and the search was illegal." Ibid. We granted certiorari. 545 U. S. (2005).

# Π

Before turning to the Ninth Circuit's conclusion that the warrant at issue here ran afoul of the Fourth Amendment's particularity requirement, we address the antecedent question whether anticipatory search warrants are categorically unconstitutional.<sup>1</sup> An anticipatory warrant is "a warrant based upon an affidavit showing probable

<sup>&</sup>lt;sup>1</sup>This issue is "predicate to an intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted). It makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all. Cf. *Wilkinson* v. *Austin*, 545 U. S. \_\_\_\_, \_\_\_ (2005) (slip op., at 9) (addressing whether inmates had a liberty interest in avoiding assignment to a "Supermax" prison, despite the State's concession that they did, because "[w]e need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest").

cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 W. LaFave, Search and Seizure §3.7(c), p. 398 (4th ed. 2004). Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called "triggering condition." The affidavit at issue here, for instance, explained that "[e]xecution of th[e] search warrant will not occur unless and until the parcel [containing child pornography] has been received by a person(s) and has been physically taken into the residence." App. to Pet. for Cert. 72a. If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. Grubbs argues that for this reason anticipatory warrants contravene the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause."

We reject this view, as has every Court of Appeals to confront the issue, see, e.g., United States v. Loy, 191 F. 3d 360, 364 (CA3 1999) (collecting cases). Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. Gates, 462 U. S. 213, 238 (1983). Because the probable-cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, "anticipatory." In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. See *People* v. *Glen*, 30 N. Y. 2d 252, 258, 282 N. E. 2d 614, 617 (1972) ("[P]resent possession is

only probative of the likelihood of future possession.").<sup>2</sup> The anticipatory nature of warrants is even clearer in the context of electronic surveillance. See, e.g., Katz v. United States, 389 U.S. 347 (1967). When police request approval to tap a telephone line, they do so based on the probability that, during the course of the surveillance, the subject will use the phone to engage in crime-related conversations. The relevant federal provision requires a judge authorizing "interception of wire, oral, or electronic communications" to determine that "there is probable cause for belief that particular communications concerning [one of various listed offenses] will be obtained through such interception." 18 U.S.C. §2518(3)(b) (emphasis added); see also United States v. Ricciardelli, 998 F. 2d 8, 11, n. 3 (CA1 1993) ("[T]he magistrate issues the warrant on the basis of a substantial probability that crime-related conversations will ensue."). Thus, when an anticipatory warrant is issued, "the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed." United States v. Garcia, 882 F. 2d 699, 702 (CA2 1989) (quoting United States v. Lowe, 575 F. 2d 1193, 1194 (CA6 1978); internal quotation marks omitted).

<sup>&</sup>lt;sup>2</sup> For this reason, probable cause may cease to exist after a warrant is issued. The police may learn, for instance, that contraband is no longer located at the place to be searched. See, e.g., United States v. Bowling, 900 F. 2d 926, 932 (CA6 1990) (recognizing that a fruitless consent search could "dissipat[e] the probable cause that justified a warrant"). Or the probable-cause showing may have grown "stale" in view of the time that has passed since the warrant was issued. See United States v. Wagner, 989 F. 2d 69, 75 (CA2 1993) ("[T]]he facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past."); see also Sgro v. United States, 287 U. S. 206, 210–211 (1932).

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Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2)contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found if the condition is met. (If that were the extent of the probability determination, an anticipatory warrant could be issued for every house in the country, authorizing search and seizure *if* contraband should be delivered—though for any single location there is no likelihood that contraband will be delivered.) Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place," Gates, supra, at 238, but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination. See *Garcia*, *supra*, at 703.

In this case, the occurrence of the triggering condition successful delivery of the videotape to Grubbs' residence would plainly establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied. Although it is possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely. The

Magistrate therefore "had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U. S., at 238–239 (quoting *Jones* v. *United States*, 362 U. S. 257, 271 (1960)).

# III

The Ninth Circuit invalidated the anticipatory search warrant at issue here because the warrant failed to specify the triggering condition. The Fourth Amendment's particularity requirement, it held, "applies with full force to the conditions precedent to an anticipatory search warrant." 377 F. 3d, at 1077–1078.

The Fourth Amendment, however, does not set forth some general "particularity requirement." It specifies only two matters that must be "particularly describ[ed]" in the warrant: "the place to be searched" and "the persons or things to be seized." We have previously rejected efforts to expand the scope of this provision to embrace unenumerated matters. In Dalia v. United States, 441 U.S. 238 (1979), we considered an order authorizing the interception of oral communications by means of a "bug" installed by the police in the petitioner's office. The petitioner argued that, if a covert entry is necessary to install such a listening device, the authorizing order must "explicitly set forth its approval of such entries before the fact." Id., at 255. This argument fell before the "'precise and clear'" words of the Fourth Amendment: "Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed." Id., at 255 (quoting Stanford v. Texas, 379 U. S. 476, 481 (1965)), 257. The language of the Fourth Amendment is likewise decisive here; its particularity requirement does not include the conditions precedent to execution of the warrant.

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Respondent, drawing upon the Ninth Circuit's analysis below, relies primarily on two related policy rationales. First, he argues, setting forth the triggering condition in the warrant itself is necessary "to delineate the limits of the executing officer's power." Brief for Respondent 20. This is an application, respondent asserts, of the following principle: "[I]f there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant." Id., at 23. That principle is not to be found in the Constitution. The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause, even though probable cause is the quintessential "precondition to the valid exercise of executive power." Much less does it require description of a triggering condition.

Second, respondent argues that listing the triggering condition in the warrant is necessary to "assur[e] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Id., at 19 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)). The Ninth Circuit went even further, asserting that if the property owner were not informed of the triggering condition, he "would 'stand [no] real chance of policing the officers' conduct." 377 F. 3d, at 1079 (quoting Ramirez v. Butte-Silver Bow County, 298 F. 3d 1022, 1027 (CA9 2002)). This argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting his search. See 377 F. 3d, at 1079, n. 9. In fact, however, neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes such a requirement. See Groh v. Ramirez, 540 U.S. 551, 562, n. 5 (2004). "The absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is ... evidence that the requirement of particular description

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does not protect an interest in monitoring searches." United States v. Stefonek, 179 F. 3d 1030, 1034 (CA7 1999) (citations omitted). The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, ex ante, the "deliberate, impartial judgment of a judicial officer . . . between the citizen and the police." Wong Sun v. United States, 371 U. S. 471, 481–482 (1963), and by providing, ex post, a right to suppress evidence improperly obtained and a cause of action for damages.

\* \* \*

Because the Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself, the Court of Appeals erred in invalidating the warrant at issue here. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.