

# Recent Case Report

## United States v. Grubbs

(2006) \_\_ U.S. \_\_

### ISSUES

Are anticipatory search warrants lawful? If so, did the Ninth Circuit err when it ruled the triggering event must be set forth in both the affidavit and the warrant?

### FACTS

Jeffrey Grubbs decided to purchase a videotape from a website that specialized in child pornography. So he sent cash for a videotape of “Lolita Mother and Daughter.”<sup>1</sup> The website was actually a sting operation run by U.S. postal inspectors. After receiving Grubbs’ letter, an inspector obtained a so-called anticipatory warrant to search Grubbs’ house for the videotape. As he explained in the affidavit, “Execution of this search warrant will not occur unless and until the [videotape] has been received by a person and has been physically taken into the residence.” The warrant, itself, did not contain any language indicating that it was anticipatory in nature.

Two days later, an undercover inspector delivered the package to Grubbs’ home. Mrs. Grubbs answered the door, signed for the package, and took it inside. A few minutes later, Grubbs left the house and was arrested. The inspectors then entered the house, executed the warrant, and seized the videotape and other evidence.

When Grubbs’ motion to suppress was denied, he pled guilty to receiving child pornography.

### DISCUSSION

Grubbs claimed the evidence should have been suppressed because, (1) anticipatory search warrants are illegal; and (2), even if they are legal, they are invalid unless the triggering event is set forth on both the affidavit and the warrant.

At the outset, the Court explained that the term “anticipatory search warrant” refers to a warrant that is issued when there is probable cause to believe the listed evidence, although not presently located in the place to be searched, will be there when a “triggering event” occurs. As noted, the triggering event in *Grubbs* was the delivery of the videotape.

**ARE ANTICIPATORY WARRANTS LAWFUL?** The Court summarily rejected Grubbs’ argument that anticipatory warrants are, per se, unlawful. In fact, it pointed out that conventional warrants are anticipatory in nature because they are issued in anticipation that the listed evidence will not be removed before the warrants are executed. This does not, however, undermine their validity (unless, of course, officers knew that the evidence had been subsequently removed) because, as the Court noted, probable cause to issue a

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<sup>1</sup> **NOTE:** Some facts were taken from the Court of Appeals decision.

warrant necessarily includes probable cause to believe the evidence “will still be there when the warrant is executed.”

Accordingly, the Court ruled that anticipatory warrants are lawful so long as the affidavit establishes the following: (1) there is probable cause to believe the evidence will be located at the place to be searched when the triggering event occurs; and (2) there is probable cause to believe the triggering event will, in fact, occur. Elaborating on this second requirement, the Court explained:

[T]he 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.

The Court then ruled that the warrant to search Grubbs' house was lawful because, although it was possible that the triggering event would not occur (if, for example, Grubbs had refused delivery), as a practical matter, this was “unlikely.”

**MUST THE TRIGGERING EVENT BE DESCRIBED ON THE WARRANT?** As noted, Grubbs also argued that anticipatory warrants are invalid unless the triggering event is described on the warrant, as well as in the affidavit. The Ninth Circuit panel that heard the case thought this was a good idea and elevated it to a constitutional requirement.

The United States Supreme Court demoted it. The Court noted that the panel had decided to impose this new requirement to give the residents an opportunity to argue with officers as to whether the triggering event had actually occurred. This was the idea of the irrepressible Circuit Judge Steven Reinhardt who worried that if the occupants were not informed of the triggering event, they would “stand [no] real chance of policing the officers' conduct.”

Writing for the majority, Justice Antonin Scalia said he was unable to find anything in the Constitution that gave property owners “license to engage the police in a debate over the basis for the warrant.” In fact, the Constitution does not even require that officers display the warrant. Instead, as Justice Scalia explained, residents are protected against unreasonable searches and seizures by the magistrates who issue warrants based on their “deliberate, impartial judgment” as to whether probable cause exists.

Consequently, the Court ruled that because the Grubbs' affidavit established probable cause to believe the triggering event would occur and, in addition, sufficiently described the triggering event, the Ninth Circuit “erred in invalidating the warrant at issue here.”

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