3. Fourth Amendment — Anticipatory Warrants. — Police officers have long struggled with the challenges associated with executing controlled deliveries while pursuing people suspected of possessing contraband. In years past, after the contraband was delivered, police had to execute an immediate warrantless search relying on the "exigency" exception or wait to obtain a warrant.[1] These options placed police officers in an awkward position: either they had to restrict their search to the confines of the exigency exception while still risking judicial second-guessing, or they had to take the chance that the contraband might have been moved by the time the warrant issued.[2] To avoid these difficulties, police can acquire an anticipatory search warrant, which is a "search warrant based on an affidavit showing probable cause that evidence of a certain crime (such as illegal drugs) will be located at a specific place in the future."[3] Such warrants become executable only upon the realization of a triggering condition in the warrant, which typically is the delivery of the contraband but can be any "condition precedent other than the mere passage of time."[4] Every court of appeals that has addressed these warrants has ruled them constitutionally permissible in certain circumstances, but the circuits have differed over which circumstances matter.[5] Last Term, in *United States v. Grubbs*,[6] the Supreme Court held that anticipatory search warrants meet the probable cause requirement of the Fourth Amendment and that the particularity requirement does not necessitate specification of the triggering conditions within the warrant itself.[7] Although the Court reached the correct result, the test it promulgated fails to protect the constitutional interests guaranteed by the Fourth Amendment by subtly undercutting the probable cause standard and by failing to demarcate the boundaries of acceptable triggering conditions, thereby giving magistrates excessive discretion.

Jeffery Grubbs purchased "Lolita Mother and Daughter," a videotape containing child pornography, from a website run by an undercover postal inspector.[8] Postal inspectors arranged a controlled deliv-

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[1] *See* United States v. Garcia, 882 F.2d 699, 703 (2d Cir. 1989). The Fourth Amendment generally requires police officers to obtain a warrant before initiating a search, but the Supreme Court has recognized several exceptions to the warrant requirement, including an exception when exigent circumstances necessitate a warrantless search. *See* United States v. Karo, 468 U.S. 705, 717 (1984); Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

[2] *See Garcia*, 882 F.2d at 703; Brett R. Hamm, Note, United States v. Hotal*: Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants*, 1999 BYU L. REV. 1005, 1005–06.

[3] BLACK'S LAW DICTIONARY 1379 (8th ed. 2004).

[4] United States v. Grubbs, 126 S. Ct. 1494, 1498 (2006).

[5] *See* United States v. Loy, 191 F.3d 360, 364 (3d Cir. 1999), and cases cited therein.

[6] 126 S. Ct. 1494.

[7] *Id.* at 1500, 1501.

[8] *Id.* at 1497.

ery of the videotape to Grubbs's residence and presented to a magistrate a warrant application supported by an affidavit stating: "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 . . . ."[9] The magistrate judge issued the warrant, and officers completed the controlled delivery two days later.[10] Inspectors detained Grubbs when he departed for work shortly thereafter and then searched the house.[11] Roughly half an hour into the search, the inspectors presented Grubbs with a copy of the warrant but did not give him a copy of the affidavit detailing the warrant's triggering condition.[12] During the search, Grubbs led the officers to the contraband, and the officers seized the pornographic video they had delivered to his home.[13] Grubbs was arrested and indicted on a single count of receiving a visual depiction of a minor engaged in sexually explicit conduct.[14] He moved to suppress the evidence seized during the inspectors' search of his house, arguing, among other things, that the warrant was invalid because it did not list the triggering condition.[15] After the district court denied his motion, Grubbs pleaded guilty but reserved his right to appeal the denial of the motion.[16]

The Ninth Circuit reversed and remanded. Writing for the panel, Judge Reinhardt held that, first, the particularity requirement of the Fourth Amendment applies to the triggering conditions of an anticipatory search warrant.[17] Accordingly, he concluded, any such warrant that did not state its triggering conditions was defective.[18] As with other violations of the particularity requirement, one may cure the defect by including documentation, such as an affidavit, that details the missing information.[19] This documentation, along with the warrant, must be presented to the person whose property is being searched; without this documentation, property owners will not be able to ascertain whether there were any triggering conditions, let alone whether they have been satisfied.[20] Because Grubbs was presented with nei-

[9] *Id.* (first omission in original) (quoting Appendix to Petition for Writ of Certiorari at 72a, *Grubbs*, 126 S. Ct. 1494 (No. 04-1414)) (internal quotation marks omitted).

[10] *Id.* at 1498.

[11] *Id.*

[12] *Id.*

[13] *Id.*; United States v. Grubbs, 377 F.3d 1072, 1075 (9th Cir. 2004).

[14] *Grubbs*, 126 S. Ct. at 1498.

[15] *Id.*

[16] *Id.*

[17] *See Grubbs*, 377 F.3d at 1077–78. Judge Betty Fletcher and Chief Judge Restani, sitting by designation from the Court of International Trade, joined Judge Reinhardt's opinion.

[18] *Id.* at 1078.

[19] *Id.*

[20] *See id.* at 1078–79.

ther a warrant containing the triggering condition nor the affidavit that cured this defect, Judge Reinhardt concluded that the search was illegal and that all the evidence recovered during the search was inadmissible.[21]

The Supreme Court reversed and remanded. Writing for the majority, Justice Scalia[22] first addressed whether anticipatory search warrants are constitutionally defective per se for lack of probable cause.[23] Grubbs argued that there can be no probable cause at the time *any* anticipatory warrant issues because the foundation for probable cause — the triggering event — will not yet have occurred,[24] but the Court rejected this contention "as has every Court of Appeals to confront the issue."[25] Instead, the Court reasoned that "[b]ecause the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, 'anticipatory.'"[26] Traditional search warrants, the Court observed, merely contain implicit predictions that the contraband will still be in the same location when the police attempt to seize it.[27] The Court restated that "[p]robable cause exists when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"[28] Hence, all warrants, including anticipatory warrants, require a "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."[29] Justice Scalia countered the argument that the triggering condition, which will not have occurred at the time of the anticipatory warrant's issuance, is the foundation of probable cause by establishing a two-pronged test for an anticipatory warrant to meet the probable cause requirement. First, the issuing magistrate must find probable cause to believe that the occurrence of the triggering condition will lead to discovery of contraband. Second, the magistrate must find probable cause to believe that the triggering condition will in fact occur.[30]

The Court then turned its attention to the Ninth Circuit's holding that the warrant violated the particularity requirement by failing to

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[21] *Id.* at 1079.

[22] Justice Scalia was joined in full by Chief Justice Roberts and Justices Kennedy, Thomas, and Breyer. Justices Stevens, Souter, and Ginsburg joined Parts I and II of the majority opinion. Justice Alito did not participate.

[23] *Grubbs*, 126 S. Ct. at 1498.

[24] *Id.* at 1498–99.

[25] *Id.* at 1499.

[26] *Id.*

[27] *Id.*

[28] *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

[29] *Id.* at 1500.

[30] *See id.*

state the triggering condition. Justice Scalia first reiterated that the Fourth Amendment's text[31] is "precise and clear" with regard to particularity: it requires particularity with respect to what is searched and what is seized, but it mentions nothing about triggering conditions.[32] Justice Scalia then countered Grubbs's first policy argument — that specificity in the warrant is necessary to circumscribe the police's power — by noting that warrants do not even require specificity with respect to probable cause, the "quintessential 'precondition to the valid exercise of executive power.'"[33] Next, addressing Grubbs's second policy argument — that specificity regarding triggering conditions is required to inform the person whose property is searched of the boundaries of the police's powers — the Court held, although no longer unanimously,[34] that Grubbs did not have a right to view the warrant before or during execution:

> 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," and by providing, ex post, a right to suppress evidence improperly obtained and a cause of action for damages.[35]

Justice Souter concurred in part and in the judgment.[36] He first noted the historical significance of warrants, writing that the "word 'warrant' in the Fourth Amendment means a statement of authority that sets out the time at which (or, in the case of anticipatory warrants,

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[31] The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

[32] *Grubbs*, 126 S. Ct. at 1500–01 (quoting Dalia v. United States, 441 U.S. 238, 255 (1979)) (internal quotation marks omitted).

[33] *Id.* at 1501.

[34] Justices Stevens, Souter, and Ginsburg did not join this holding.

[35] *Grubbs*, 126 S. Ct. at 1501 (omission in original) (citation omitted) (quoting Wong Sun v. United States, 371 U.S. 471, 481–82 (1963)). The Court stated, moreover, that no property owner has *ever* had a right to view the warrant before or during execution. *See id.* at 1501 (citing Groh v. Ramirez, 540 U.S. 551, 562 n.5 (2004)). Notably, *Groh* did not address "[w]hether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." *Groh*, 540 U.S. at 562 n.5. Given that Grubbs was an occupant of the premises searched, was charged with a nonviolent crime, and cooperated with the officers, his situation seems to be precisely what the *Groh* Court contemplated. Because this question still has not been decided, it may qualify for the exception that *Groh* implied. Also, importantly, the statement in *Grubbs* regarding the right of a property owner to view a warrant arguably constitutes dicta, as the Court had already held that particularity did not require the specification of the triggering condition.

[36] Justice Souter was joined by Justices Stevens and Ginsburg.

the condition on which) the authorization begins."[37] Next, Justice Souter noted the practical difficulties with warrants that do not detail their triggering conditions.[38] He suggested that if the officer who executed the warrant was not the one who made the application, and the warrant was executed before the triggering condition occurred, the exclusionary rule would likely apply.[39] He also mentioned that the right of an owner to inspect the warrant upon request is the subject of unsettled law and could be recognized in the future.[40] Finally, regardless of whether any right exists, allowing the person whose property is to be searched to inspect a complete warrant would serve the purposes of informing the property owner, validating the authority of the officer, and affording the property owner the opportunity to correct any mistake regarding whether the conditions precedent had been met.[41]

The Court correctly ruled that anticipatory search warrants do not violate the probable cause requirement per se; however, the Court's approach was not faithful to the Fourth Amendment requirements that assure protection to property owners. First, *Grubbs* may, if interpreted literally, actually make it easier for police to show that there is a high probability of illegal activity. Second, *Grubbs* did not set a limit on the ability of the magistrate to delegate decisionmaking authority to the executing officer.

On a literal interpretation, the Court's test lowers the threshold for probable cause, defined as the minimum probability of finding contraband at the particular location that will support a warrant application:

> [F]or 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," but also that there is probable cause to believe the triggering condition *will occur*.[42]

Hence, an anticipatory warrant requires both probable cause that realization of the triggering condition will cause contraband to be found and probable cause that the triggering condition will occur.

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[37] *Grubbs*, 126 S. Ct. at 1502 (Souter, J., concurring in part and concurring in the judgment).

[38] *Id.*

[39] *See id.*

[40] *See id.* at 1502–03 (citing *Groh*, 540 U.S. at 562 n.5). Justice Stevens, who joined Justice Souter's opinion, authored the majority opinion in *Groh*.

[41] *See id.* at 1503.

[42] *Id.* at 1500 (majority opinion) (citation omitted) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). In *Gates*, the Court used the "fair probability" phrase to define probable cause. *See Gates*, 462 U.S. at 238 ("The task of the issuing magistrate [in determining whether probable cause has been shown] is . . . to make a practical, commonsense decision whether . . . there is a fair probability that contraband . . . will be found in a particular place.").

Suppose that there is probable cause for an event to occur when the probability of that event equals or exceeds an unknown number α, where $0 < \alpha < 1$.[43] For an anticipatory warrant to meet the first requirement of Justice Scalia's two-pronged test, the probability that contraband will be found given that triggering condition must be greater than or equal to α. This first requirement is represented mathematically as $P(C \mid T) \geq \alpha$. To fulfill the second prong, the probability that the triggering condition will occur must also be at least α. This second requirement is represented mathematically as $P(T) \geq \alpha$.

The law of total probability[44] can be used to determine the amount by which the Court's rule lowered the threshold for probable cause. The probability of finding contraband can be expressed as:

$$P(C) = P(C \mid T)P(T) + P(C \mid \sim T)P(\sim T). \tag{1}$$

Suppose that $P(C \mid T)$ and $P(T)$ are both equal to the minimum constitutionally acceptable level α. Because the probability that contraband is found must also be greater than or equal to α, it follows from equation (1) that:

$$P(C) = \alpha^2 + P(C \mid \sim T)(1-\alpha) \geq \alpha. \tag{2}$$

Simplifying the inequality yields:

$$\begin{aligned} &\alpha^2 + P(C \mid \sim T)(1-\alpha) \geq \alpha \\ &P(C \mid \sim T)(1-\alpha) \geq \alpha - \alpha^2 \\ &P(C \mid \sim T)(1-\alpha) \geq \alpha(1-\alpha) \\ &P(C \mid \sim T) \geq \alpha. \end{aligned} \tag{3}$$

Thus, assuming that the bare minimum of the Court's test is met, probable cause with respect to contraband requires probable cause to find contraband *regardless of whether the triggering condition is met*.

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[43] In the following mathematical notation, P represents the probability function, C represents the event that contraband is found, and T represents the triggering condition. The notation $\sim T$ represents the complement of T; that is, $P(\sim T) = 1 - P(T)$. The symbol $\cap$ represents the binary operation of set intersection; that is, $P(A \cap B)$ represents the probability that the events A and B both occur.

[44] The law of total probability states that $P(A) = P(A \mid B)P(B) + P(A \mid \sim B)P(\sim B)$ for any two events A and B. *See* JOHN A. RICE, MATHEMATICAL STATISTICS AND DATA ANALYSIS 17–18 (2d ed. 1995) (defining and proving the law of total probability).

Additionally, the definition of conditional probability[45] affords the following equation based on the probability that both the triggering condition and the contraband requirement are satisfied:

$$P(C \mid T)P(T) = P(T \cap C) = P(T \mid C)P(C). \tag{4}$$

Because the Fourth Amendment's probable cause requirement is concerned with the probability of contraband, it is useful to solve for this term:

$$P(C) = P(C \mid T)P(T) / P(T \mid C). \tag{5}$$

And because a warrant can issue only if the probability of finding contraband is at least α,[46] it follows that:

$$P(C) = P(C \mid T)P(T) / P(T \mid C) \geq \alpha. \tag{6}$$

Assuming that police "toe the line" and apply for warrants when the probabilities of the triggering condition's occurrence and of finding contraband both equal the minimally acceptable level yields the following expression:

$$P(C) = \alpha^2 / P(T \mid C) \geq \alpha. \tag{7}$$

Simplifying shows a condition guaranteeing that an anticipatory warrant is backed by probable cause:

$$P(T \mid C) \leq \alpha. \tag{8}$$

Thus, assuming that the minimum probable cause requirement was met, the probability of contraband is guaranteed to be at least α — and therefore guaranteed to meet probable cause — if and only if the probability that the triggering condition will be met given the existence of contraband is less than or equal to α.

Hence, to guarantee probable cause with respect to the contraband — assuming that the Court's test was satisfied by the bare minimum probabilities — an executing officer must show either that the probability of the triggering condition given contraband is less than or

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[45] The conditional probability of one event A given another event B, represented as $P(A \mid B)$, is defined by the relationship $P(A \mid B) = P(A \cap B) / P(B)$. *See id.* at 15–17.

[46] The *Grubbs* Court did not define α as the minimum probability of finding contraband, but it is appropriate to make such an assumption because the Constitution requires probable cause to show that the contraband will eventually be at the given location. The inequality, which results in adding a requirement to the Court's test, is thus assumed to complete the derivation.

equal to α or that the probability of contraband given that the triggering condition fails is at least α. Both of these sets of circumstances imply that contraband might come from a source other than the triggering condition — some article of contraband other than that contained in the controlled delivery. Given that there is contraband on the premises, a low probability that the triggering condition will be satisfied implies a high probability that the contraband came from somewhere else.

Equation (3) is even more startling. It shows that the Court's test is so weak that if the officers are walking the line with respect to minimum probabilities, they should have to show probable cause of contraband even if the triggering condition is not satisfied. Fortunately, this situation will probably be rare. In most anticipatory warrant cases, the probability of contraband given the satisfaction of the triggering condition is high because the officers inspected the contents of the package and knew that it contained contraband. The same is true of the probability of satisfying the triggering condition if delivering the package is a simple task. This reality mitigates but does not eliminate the Court's mistake. While the Court correctly believed that high probabilities with respect to the triggering condition would increase the probability of contraband, probable cause is too low of a standard when the constitutional requirement is divided into its constituent parts. For a stylized example, assume that the minimum probability required to satisfy the probable cause requirement is 50%. Assume further that the probability that a certain package will be delivered and the probability that it contains drugs are both also 50%. Finally, assume that no evidence indicates the existence of drugs at the particular location, meaning that the probability of contraband assuming the triggering condition is not satisfied must be zero. At the time the warrant issues in this scenario, the probability that drugs will be in the house in the future is only 25%, which is significantly lower than the 50% hypothetical requirement for probable cause. Even if both initial probabilities were assumed to be 70%, the final probability would be only 49%, which is still too low. Although this analysis is not straightforward, the solution is simple: the Court should have required probable cause that contraband will be at the particular location in the future. In its most exacting interpretation, this rule would force the police to wait until the triggering condition occurs before applying for a warrant.

There is yet another constitutional problem with anticipatory warrants, which stems from the inherent delegation of discretion from an impartial magistrate to the officer executing the warrant. The Supreme Court has long recognized that the "determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make ar-

rests."[47] Probable cause analysis normally takes into account the totality of the circumstances:

> [W]e have treated reasonableness [in a warrant inquiry] as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.[48]

Anticipatory search warrants, however, necessarily transform a magistrate's balancing test into a binary decision made by the officer on the scene. With a traditional warrant, the magistrate can apply the test of probable cause to specific facts, all of which are known. With an anticipatory warrant, constitutional validity is a function of the yes-or-no triggering condition. Although the triggering condition is correlated with a precise ex post probable cause determination, that correlation may be imperfect, and the anticipatory warrant cannot dynamically account for the quality of the supporting evidence.[49] In effect, an anticipatory warrant must be issued by a magistrate wearing blinders that block from his view all information about how the triggering condition will be satisfied.

But delegating factual determinations does more than merely deprive magistrates of the ability to assess probable cause. It also undermines the purposes of the warrant requirement as laid out in both the constitutional text and the Court's precedents. It is much easier to determine probable cause ex post than to craft a bright-line test, however customized, ex ante. Hence, the nature of the probable cause analysis of anticipatory warrants, which is transformed from a totality-of-the-circumstances determination into a binary, bright-line test, is

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[47] United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

[48] United States v. Banks, 540 U.S. 31, 36 (2003); *see also* Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."); Illinois v. Gates, 462 U.S. 213, 230–31 (1983) ("Th[e] totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied . . . ." (footnote omitted)); Ker v. California, 374 U.S. 23, 33 (1963) ("[S]tandards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application . . . ."); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness [in the context of the Fourth Amendment]. Each case is to be decided on its own facts and circumstances.").

[49] For example, the magistrate assessing the warrant cannot know whether the officer observed the controlled delivery from across the street or from a kilometer away. The court in *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993), attempted to address this flaw by imposing a requirement that any discretion left to the officer be reduced to "almost ministerial proportions." *Id.* at 12. This requirement undoubtedly mitigates the delegation problem by reducing the officer's discretion. Importantly, the police still bear the burden of finding and reporting facts. The magistrate has the essential but limited task of determining whether probable cause exists. An ideal rule would permit the police to retain their factfinding function without allowing them any additional leeway regarding the probable cause assessment. By deciding not to impose this or a similar requirement, the *Grubbs* Court allowed police more discretion than is necessary.

corrupted by the on-site determinations of the arresting officer.[50] Indeed, nondelegation has strong historical and textual roots:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[51]

Anticipatory warrants improperly empower the police to initiate searches. Regardless of whether these warrants are effective, they undermine the historical constitutional scheme. Indeed, the requirement that an impartial judicial officer issue the warrant is part of the definition of a warrant itself.[52]

In sum, the Fourth Amendment has many textual protections, and *Grubbs* principally implicates probable cause, particularity, and issuance by an impartial magistrate. The *Grubbs* Court correctly ruled that particularity was satisfied, but it improperly defined and incorporated probable cause into its test. In addition, the Court's analysis of anticipatory warrants seemingly conflicts with judicial nondelegation principles. The Court should remedy these shortcomings by using the traditional definition of probable cause in the context of anticipatory warrants and by prohibiting magistrates from delegating their determinations of constitutionally significant facts.

4. Fourth Amendment — Consent Search Doctrine — Co-occupant Refusal To Consent. — The Fourth Amendment to the U.S. Constitution prohibits "unreasonable searches"[1] but does not define that phrase. The Supreme Court has labored to articulate a consistent

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[50] In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court found a warrant invalid because it was issued by the state attorney general. Although he was a state official who held a high office, his status as a law enforcement officer interfered with his ability to remain impartial and thus rendered the warrant unconstitutional. *Id.* at 449. Even if an anticipatory warrant is issued by a magistrate, the courts should be wary of permitting the police to have the final say over whether the warrant is executable.

[51] Johnson v. United States, 333 U.S. 10, 13–14 (1948) (footnote omitted).

[52] *See* BLACK'S LAW DICTIONARY, *supra* note 3, at 1379 (defining "search warrant"). However, allowing anticipatory warrants without a delegation limitation is more constitutionally sound than continuing down a path that would carve out yet another exception to the warrant requirement. The Court has held that there is no expectation of privacy in a container if the police have previously searched its contents. Illinois v. Andreas, 463 U.S. 765, 771 (1983). Although this rule currently does not permit warrantless searches of the home, it no longer seems too much of a stretch to permit a limited exception to the warrant requirement if the police have delivered the contraband themselves.

[1] U.S. CONST. amend. IV.