

# FBI

## Law Enforcement Bulletin

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**Lateral Entry**  
*A Move Toward the Future*

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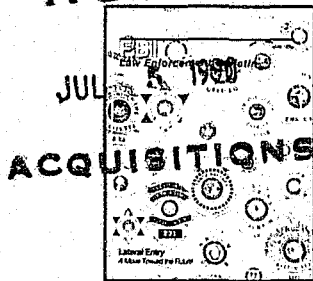
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William S. Sessions, Director

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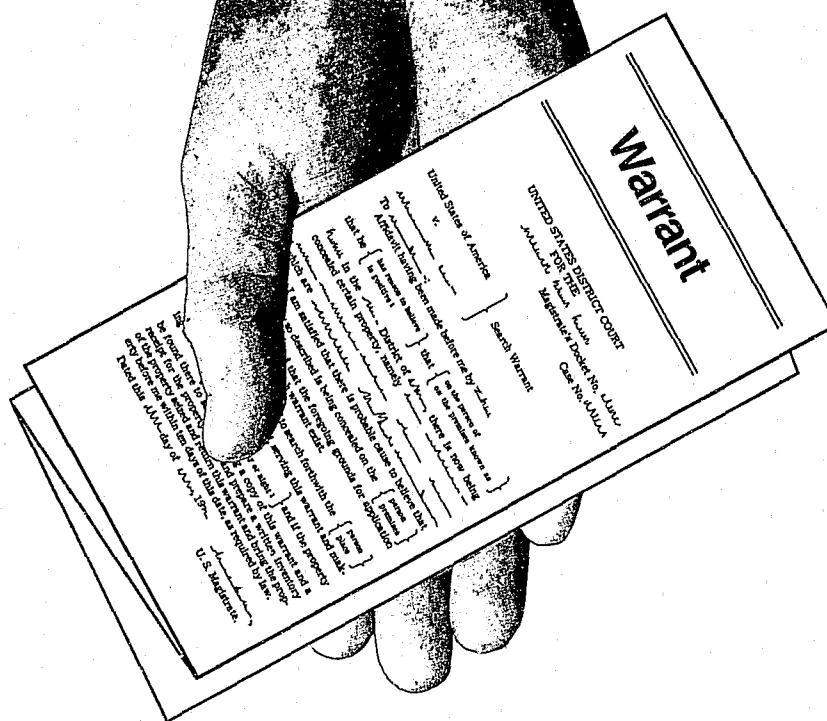
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## Anticipatory Search Warrants

By  
A. LOUIS DIPIETRO, J.D.

**T**he fourth amendment to the U. S. Constitution requires that search warrants be based on a showing of probable cause. The probable cause requirement is satisfied when a law enforcement officer sets forth facts which indicate a fair probability that a crime has been committed and that evidence of that crime is presently located at a particular location.<sup>1</sup>

Sometimes, however, law enforcement officers only have information that evidence will be in a

particular location at some future time, but have no reliable information about the present location of that evidence. For example, an officer might receive reliable source information indicating that contraband will be delivered to a particular address the next day. If the officer waits until the delivery is made to obtain a warrant to search that location, the officer runs the risk that the evidence will be moved or destroyed before the warrant can be executed. As an alternative, the

officer might conduct a warrantless search of the premises immediately upon delivery of the contraband and attempt to justify that search under the emergency exception<sup>2</sup> to the warrant requirement. The risk the officer runs by this course of action is that a court may find probable cause lacking or fail to recognize the emergency, and accordingly, suppress the evidence under the provisions of the exclusionary rule.<sup>3</sup>

The law provides a solution to this dilemma. Rather than risking

either loss or suppression of the evidence, the officer can use an anticipatory or prospective search warrant. An anticipatory search warrant is based on a showing of probable cause that at some future time (but not presently) certain evidence of crime will be located at a specific place. Where officers have probable cause to believe that evidence or contraband will arrive at a certain location within a reasonable period of time, they need not wait until delivery before requesting a warrant. Instead, officers may present this probable cause to a magistrate prior to the arrival of that evidence, and the magistrate can issue an anticipatory search warrant based on probable cause that the evidence will be found at the location to be searched at the time the warrant is executed.

The purpose of this article is to acquaint law enforcement officers with the uses and requirements for

anticipatory warrants. After reviewing the general judicial acceptance of anticipatory warrants, the article discusses numerous court decisions involving various investigative applications for anticipatory search warrants. The article also offers several recommendations for avoiding potential constitutional challenges to the use of anticipatory warrants.

### JUDICIAL ACCEPTANCE OF ANTICIPATORY WARRANTS

Although the Supreme Court has never directly addressed the issue of anticipatory warrants,<sup>4</sup> numerous lower courts have ruled that it is constitutionally permissible to obtain such a warrant. Challenges to the constitutionality of prospective search warrants often involve claims that the fourth amendment probable cause requirement is not satisfied, because at the time of the warrant's issuance, there is no prob-

able cause to believe that the items to be seized are presently at the place to be searched.

However, the vast majority of State and Federal courts that have considered this question have concluded that anticipatory warrants are constitutional and consistent with the longstanding preference that whenever possible, police obtain judicial approval before searching. Judicial acceptance of the anticipatory warrant also encourages police to use the warrant process rather than taking warrantless action. Moreover, privacy interests are better protected by permitting law enforcement officers to obtain warrants in advance if they can show probable cause to believe that the object of the search will be located on the premises at the time the search takes place.

### INVESTIGATIVE APPLICATIONS OF ANTICIPATORY WARRANTS

For purposes of this article, court decisions involving various investigative applications of anticipatory warrants have been categorized according to the degree of police control over the delivery of the evidence to the place to be searched as follows: 1) Mail deliveries; 2) controlled delivery by cooperating witness; and 3) delivery uncontrolled by the government.

#### Mail Deliveries

The anticipated mail delivery of packages containing items subject to seizure is the most common use for anticipatory warrants.<sup>5</sup> For example, in *United States v.*



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the evidence.**”

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*Goodwin*,<sup>6</sup> and *United States v. Dornhofer*,<sup>7</sup> the U. S. Postal Inspection Service set up a child pornography reverse sting operation to locate and prosecute individuals who receive child pornography through the mail.

Postal inspectors mailed to the defendants child pornography catalogs summarizing available material in graphic terms. After receiving orders from the defendants for this material, postal inspectors obtained anticipatory search warrants to search those locations where the material was to be delivered. In both cases, the postal inspectors affirmed in their search warrant affidavits that through their efforts, pornographic materials would be delivered by mail to the particular locations to be searched. Government agents, thereafter, observed the anticipated deliveries and then executed the search warrants and recovered the delivered pornography, as well as other sexually explicit material.

In both cases the U. S. Court of Appeals for the Fourth Circuit upheld the constitutionality of these anticipatory warrants. The court concluded there was probable cause to issue a search warrant, even though at the time of the warrant's issuance the evidence had not yet been delivered to the location to be searched.

#### **Controlled Delivery by Cooperative Witness**

In *United States v. Garcia*,<sup>8</sup> two U.S. military servicemen,

Hooks and Oliver, were caught by U. S. Customs agents in Miami trying to smuggle cocaine into the country from Panama. After being flown to New York to meet with Drug Enforcement Administration (DEA) agents, Hooks and Oliver

**“...anticipatory warrants are constitutional and consistent with the longstanding preference that... police obtain judicial approval before searching.”**

agreed to cooperate and proceed with a controlled delivery of the cocaine. They telephoned the defendant and made arrangements to bring the cocaine to the apartment where she was then located. Before delivery, DEA agents applied for and received an anticipatory search warrant for that apartment. With the cocaine still in their duffel bags, Hooks and Oliver went to the apartment under observation of DEA agents. After being admitted and given permission to wait for the defendant, Hooks and Oliver sat down in the living room and placed the duffel bags next to them. Five to 10 minutes later, while Hooks and Oliver were still waiting and before the defendant or anyone else had taken possession of the duffel bags, DEA agents entered and executed the search warrant.

The U. S. Court of Appeals for the Second Circuit upheld the validity of the anticipatory search warrant and concluded as follows:

“The fact that 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.’ ”<sup>9</sup>

In rejecting the defendant's claim that the agents acted prematurely when they entered and searched the apartment before the cocaine was transferred personally to the defendant, the court stated that the warrant was valid upon delivery of cocaine to the apartment and did not require that

anyone take possession prior to execution of the warrant.

#### **Delivery Uncontrolled by the Government**

In some cases, anticipatory warrants have been used where officers do not have control over the delivery of evidence to the location to be searched. For example, in *United States v. Goff*,<sup>10</sup> DEA agents in Seattle developed probable cause to believe that Goff and Jacobson were making a 36-hour round trip to Miami to purchase a large quantity of cocaine. After airline personnel confirmed that the defendants had boarded the nonstop return flight to Seattle, the agents applied for an anticipatory warrant that was issued while the plane was in flight.

In approving the subsequent search that occurred when the



defendants disembarked from the plane in Seattle, the U. S. Court of Appeals for the Ninth Circuit held that there was probable cause to believe that the persons searched would arrive within the district in a reasonable time and that the warrant could not be executed until their arrival. The court concluded that issuing a warrant in anticipation of these events created no danger that the property seized would be other than the property sought in the warrant; anticipating future events did not detract from probable cause which must exist at the time of the search.<sup>11</sup>

In another uncontrolled delivery case, *Commonwealth v. Reviera*,<sup>12</sup> an undercover officer went to a certain address, knocked on the door, and told the defendant who answered the door that he wished to buy one ounce of cocaine. The defendant said he was waiting for delivery, which would occur at approximately 10:00 p.m., and directed the undercover officer to return after 10:00 p.m., at which time he could purchase cocaine for \$1,300 per ounce. Several other persons also approached the defendant about buying cocaine and were similarly told to return after 10:00 p.m. Based on these facts and additional informant information, an anticipatory warrant was obtained. The Pennsylvania Superior Court upheld the validity of this anticipatory warrant on the grounds there was a fair probability that contraband and evidence would be found at the particular location to be

searched at the time the warrant would be executed.

### **POTENTIAL CONSTITUTIONAL CHALLENGES**

The fourth amendment mandates that all search warrants, including anticipatory warrants, be based on facts establishing probable cause and must particularly describe the place to be searched and the person or things to be seized. The war-

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”**

rant must be issued by a neutral and detached magistrate. Anticipatory warrants can also be challenged on constitutional grounds if the search warrant affidavit lacks adequate facts indicating that the evidence to be seized is on a “sure course” to the location to be searched, or if there is inadequate judicial control of the warrant execution.

### **Evidence on a “Sure Course” to Delivery**

Although the vast majority of Federal and State courts that have considered anticipatory warrants have approved their use, some courts have required a showing that the contraband or evidence to be

seized is on a “sure course” to its destination. For example, in *United States v. Hendricks*,<sup>13</sup> a Customs officer inspected a cardboard box arriving from Brazil, which was addressed to Hendricks in Tucson, Arizona, but shipped in such a manner that Hendricks was required to pick it up personally in Tucson. Inside the box was a suitcase in which the inspector found hidden 5 to 7 pounds of cocaine. The box was sent on to Tucson where it was turned over to the DEA. While holding the box, DEA agents developed additional incriminating evidence and applied for a search warrant to search Hendricks’ residence.

The magistrate issuing the warrant knew that the suitcase was then in the DEA’s possession and not at the Hendricks residence, and accordingly, inserted a provision in the warrant specifying that it was to be executed only upon the condition that the box is brought to the Hendricks residence. However, since at the time the warrant was issued, Hendricks had not picked up the box, there was no assurance that he would pick it up, or even if he did, that he would ever take the box to the house. Therefore, the court found there was not a sufficient nexus or connection between the box and the residence. The court held that unless the suitcase was on a sure course to the house (as for example in mail addressed to the house), no probable cause would exist to believe it would arrive there.<sup>14</sup>

The "sure course" language of *Hendricks* has been cited with approval by several other courts.<sup>15</sup> To help ensure that a warrant will withstand subsequent attack based on lack of sufficient nexus between the place to be searched and the things to be seized, prudent investigators should attempt to develop facts indicating that the evidence is on a sure and irreversible course to its destination prior to applying for an anticipatory warrant.

### Ensuring Adequate Judicial Control of Warrant Execution

The element of time may be highly relevant to the validity of a search warrant and its execution. The reason many courts require traditional search warrants to be executed "forthwith" is to ensure that measure of judicial control over the search which the warrant procedure is intended to accomplish. Passage of an undue amount of time between issuance and execution raises the danger that the described property will no longer exist at the premises to be searched. The danger of loss of judicial control might be as great in the case of a warrant issued to take effect some time in the future as in the case of a stale warrant.<sup>16</sup>

An anticipatory warrant is based on a magistrate's determination that sufficient probable cause exists to believe that at some future time (but not presently), certain evidence will be located at a particular place. A potential constitutional problem with such warrants is

that the issuing magistrate abdicates to the officers executing the warrant an important judicial function, namely, the determination that probable cause exists to believe that the objects are currently in the place to be searched.

While it is logical to assume that officers will not be disposed to undermine the success of their investigative efforts by the premature execution of an anticipatory warrant, it is nonetheless preferable to

event never occurs, the warrant may not be executed.<sup>19</sup>

To guard against successful challenges to the validity of anticipatory warrants based on an alleged loss of judicial control in their execution, officers should place reasonable limiting language in their warrant affidavits specifying that execution will not occur in the absence of a particular contingency, such as: 1) A scheduled time for delivery; 2) a given event; 3) police surveillance confirming that the package has been delivered; or 4) a particular method that allows executing officers to know that the items are in the place to be searched. Such language in the affidavit may save an otherwise defective warrant if the magistrate merely fails to include that limiting language in the warrant itself.

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”**

### CONCLUSION

The anticipatory or prospective search warrant is obtained in advance of the anticipated time for delivery of evidence to the place to be searched so police may promptly execute the search when delivery is made. When police are confronted with the need for quick action, anticipatory warrants provide a practical alternative to proceeding with no warrant and risking suppression of the evidence. If police delay applying for a warrant until the evidence arrives at the place to be searched, they increase the risk that the evidence will be lost before the search can be made. Officers applying for anticipatory warrants should ensure that their search

deal with time limitations as to execution explicitly in the warrant application process.<sup>17</sup> In that regard, some courts prefer the issuing magistrate to protect against premature execution by defining the circumstances and/or conditions that must be present prior to its execution.<sup>18</sup> For example, the issuing magistrate could delete the forthwith command found pre-printed on many warrant forms and insert a directive that execution occur only upon the happening of a specific event, such as delivery of the evidence. This ensures judicial control because if the critical future



warrant affidavits meet traditional fourth amendment requirements, and also reflect that the items are on a "sure course" to the place to be searched. Officers should also include appropriate limiting language in the affidavit to prevent loss of judicial control.

**LEB**

#### FOOTNOTES

<sup>1</sup> See *New York v. P.J. Video*, 106 S.Ct. 1610 (1986); *Andresen v. Maryland*, 427 U.S. 463 (1976).

<sup>2</sup> See Sauls, "Emergency Searches of Premises," *FBI Law Enforcement Bulletin*, vol. 56, Nos. 3-4, March and April 1987.

<sup>3</sup> See Fiatal, "The Judicial Preference for the Search Warrant: The Good Faith Warrant Exception to the Exclusionary Rule," *FBI Law Enforcement Bulletin*, vol. 55, No. 7, July 1986.

<sup>4</sup> In *Berger v. New York*, 388 U.S. 41 (1967), the Supreme Court indirectly acknowledged such a possibility when it indicated that it could be constitutionally permissible to obtain a warrant authorizing the seizure (through the use of electronic surveillance) of oral communications which will not exist until vocalized by the participants to that conversation at some future time.

<sup>5</sup> 2 W.R. LaFave, *Search and Seizure* sec. 3.7(c) at 94 (2d ed. 1987).

<sup>6</sup> 854 F.2d 33 (4th Cir. 1988).

<sup>7</sup> 859 F.2d 1195 (4th Cir. 1988), *cert. denied*, 107 S.Ct. 1639 (1989).

<sup>8</sup> 882 F.2d 699 (2d Cir. 1989).

<sup>9</sup> *Id.* at 702.

<sup>10</sup> 681 F.2d 1238 (9th Cir. 1982).

<sup>11</sup> The court also rejected a challenge to the warrant under Rule 41(a) of the Federal Rules of Criminal Procedure, which requires a Federal search warrant be issued in the district where the person or property sought is located. The court stated the rule does not require that in every circumstance, the evidence sought must be physically in existence within the district at the time the warrant issues. Although the warrant cannot be executed until the object of the search is in the district, the rule is not violated when the affidavit clearly demonstrates that the objects of the search will exist in the district within the time allowed for execution.

<sup>12</sup> 563 A.2d 1252 (Pa. Super. 1989).

<sup>13</sup> 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

<sup>14</sup> Although the warrant was invalid for lack of probable cause, the agents' good faith reliance on it was held to be reasonable, and therefore, the evidence was nevertheless admissible.

<sup>15</sup> See, e.g., *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986), *cert. denied*, 107

S.Ct. 110; *Goodwin*, *supra* note 6; *Dornhofer*, *supra* note 7.

<sup>16</sup> *United States ex rel Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969).

<sup>17</sup> LaFave, *supra* note 5, at 98.

<sup>18</sup> *Commonwealth v. Soares*, 424 N.E. 2d 221 (Mass Sup. Ct. 1981). In *Garcia*, *supra* note 8 at 702, the Second Circuit Court of Appeals held:

"When a government official presents independent evidence indicating that delivery of contraband will, or is likely to, occur, and when the magistrate conditions the warrant on that delivery, there is sufficient probable cause to uphold the warrant."

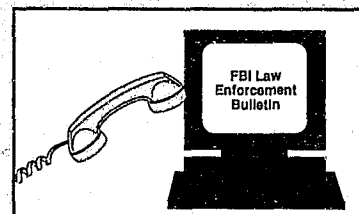
<sup>19</sup> Although desirable, the absence of contingencies is not necessarily fatal where premature execution is unlikely. See, *Reviera*, *supra* note 12.

*Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

### Author's Note

On May 1, 1990, the U.S. Supreme Court sent to Congress proposed amendments to Rule 41(a) of the Federal Rules of Criminal Procedure. The first amendment would permit warrants to search where the person or property is outside the jurisdiction when the warrant is issued, but within the district by the time the warrant is executed. A second amendment would permit the issuance, by Federal magistrates only, of search warrants for property or persons who are within the district when the warrant is issued, but might move outside the district before the warrant is executed.

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