

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner, :

5 v. : No. 04-1414

6 JEFFREY GRUBBS. :

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8 Washington, D.C.

9 Wednesday, January 18, 2006

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 10:14 a.m.

13 APPEARANCES:

14 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

15 Department of Justice, Washington, D.C.; on behalf

16 the Petitioner.

17 MARK J. REICHEL, ESQ., Sacramento, California; on

18 behalf of the Respondent.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument
first today in No. 04-1414, United States v. Grubbs.
General Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN
ON BEHALF OF THE PETITIONER

MR. DREEBEN: Mr. Chief Justice, and may it
please the Court:

The postal inspectors in this case applied
for a warrant to search respondent's property. The
warrant that they obtained particularly described the
place to be searched and the things to be seized. It
was issued based on an affidavit that informed the
magistrate judge that a videotape containing child
pornography that respondent had ordered through the
mail and had paid for in cash was going to be delivered
to respondent's house and that the warrant would not be
executed until the delivery had taken place.

The Ninth Circuit held that the execution of
this warrant, which occurred after the delivery that
the postal inspectors represented would occur had in
fact happened, violated the Particularity Clause of the
Fourth Amendment.

The Ninth Circuit's opinion is wrong because

1 the Particularity Clause of the Fourth Amendment
2 addresses two specific topics: the place to be
3 searched and the persons or things to be seized. It
4 does not address the time of execution of a warrant,
5 which the Ninth Circuit impermissibly read into the
6 Fourth Amendment in violation of its text.

7 The Ninth Circuit held, therefore, that
8 because the warrant was not in accordance with the
9 Particularity Clause, this search was equivalent to a
10 warrantless search and that all fruits of the search
11 had to be suppressed.

12 JUSTICE SOUTER: I think, Mr. Dreeben, at the
13 end of the day, I agree with you on the particularity
14 argument, but do you take the -- does the Government
15 take the position that the -- that the -- that a valid
16 warrant need not contain an indication of the time
17 within which it may be served, executed?

18 MR. DREEBEN: That's right, Justice Souter.
19 In the Government's view, the Warrant Clause
20 specifically addresses those things that need to be on
21 the face of the warrant.

22 JUSTICE SOUTER: As far as --

23 JUSTICE KENNEDY: What would prevent the
24 issuance of just a blanket warrant? We have a warrant
25 for this -- for this premises to be searched.

1 MR. DREEBEN: What would prevent the valid
2 execution of a warrant that had no time limits
3 whatsoever would be the requirement that a warrant must
4 be supported by probable cause. And if agents executed
5 a warrant at a time at which there was no probable
6 cause, for example, because they executed it before the
7 delivery had taken place or they executed it after a
8 time at which probable cause had become stale, the
9 search would be unreasonable and the fruits of the
10 search would probably have to be suppressed.

11 JUSTICE SCALIA: I suppose that a warrant
12 like a -- like a contract has a -- a reasonable life.
13 Don't you think a warrant expires if it does not have a
14 concluding date? You think it goes on forever and ever
15 and ever? Don't you think a warrant just lasts a
16 reasonable time?

17 MR. DREEBEN: I think it absolutely just
18 lasts a reasonable time, Justice Scalia, and the reason
19 why there is very little law and very little litigation
20 on this is that since the 1917 statute that Congress
21 originally wrote to provide for the issuance of Federal
22 search warrants, it's provided for a 10-day execution
23 period, and that 10-day limit has been contained and
24 continued in the Federal Rules of Criminal Procedure.
25 So in the ordinary --

1 CHIEF JUSTICE ROBERTS: Mr. Dreeben, I
2 understood you to say a short while ago that if it were
3 executed before the triggering event, it would be
4 invalid because there was no probable cause.

5 MR. DREEBEN: Well, I -- I don't want to say
6 that there's no probable cause for the warrant.

7 CHIEF JUSTICE ROBERTS: No, you don't because
8 then the warrant shouldn't have issued.

9 MR. DREEBEN: No. There -- there is probable
10 cause that the magistrate has to believe that the
11 videotape, which was one of the items to be seized,
12 would be found at the premises at the time that the
13 search was to be executed, which was represented in the
14 affidavit to be after the delivery takes place. If, in
15 fact, the warrant is executed at a time before the
16 delivery takes place, then the warrant has failed to
17 conform to the probable cause that supported it and the
18 search would be unreasonable.

19 JUSTICE SCALIA: Even -- even if the warrant
20 did not specifically say that it was an anticipatory
21 warrant and that -- and that you can only execute it
22 after the delivery?

23 MR. DREEBEN: That's right, Justice Scalia,
24 because there is an independent requirement that
25 probable cause must exist at the time of the execution

1 of the warrant. Officers are --

2 JUSTICE SCALIA: But I thought that's
3 supposed to be a -- a magistrate's determination.

4 MR. DREEBEN: There are two separate things
5 that are going on. One is what the magistrate must do
6 at the time that he issues the warrant. The magistrate
7 must find that there is probable cause to believe that
8 offense -- an offense has been committed, is being
9 committed, or is about to be committed, and that the
10 items that the warrant is going to request to be seized
11 will be present at the location at the time of
12 execution. And the magistrate in this case was easily
13 able to make those determinations based on the warrant
14 affidavit that was submitted to him.

15 But there is an additional requirement of
16 reasonableness, that officers may not execute a
17 warrant, even if it was validly issued, if they become
18 aware of facts that would tell a reasonable officer --

19 JUSTICE KENNEDY: If they become aware, but
20 the -- it's a big leap from that to say that they must
21 make their own determination of probable cause.

22 MR. DREEBEN: Well, I -- I think, Justice
23 Kennedy, the easiest example to -- to see why this --

24 JUSTICE KENNEDY: You -- you indicated a
25 warrant can't be served unless they determine there's

1 probable cause, but that's for the magistrate to do, as
2 Justice Scalia --

3 MR. DREEBEN: I -- what I -- I'm making a
4 separate point here, which is that officers have a
5 continuing obligation to act reasonably in the
6 execution of a warrant, and of course, they fulfill
7 that in a variety of ways. They have to be reasonable
8 in identifying the property that's -- that's specified
9 in the warrant and that they go to search. They have
10 to be reasonable in conducting the search of places
11 within that property to see that they're looking for
12 the things that are specified in the warrant and not
13 going on a fishing expedition for things that are not.

14 They have to be reasonable in deciding whether they
15 decide to dispense with knock and announce, and they
16 also have to be reasonable in deciding that the basis
17 for probable cause that they used to support the
18 issuance of the warrant has not become so stale that a
19 reasonable officer would know that that warrant should
20 not be executed.

21 JUSTICE STEVENS: Well, does that mean that
22 the executing officer must be the same officer who got
23 the warrant?

24 MR. DREEBEN: No, it certainly doesn't,
25 Justice Stevens.

1 JUSTICE STEVENS: I don't know why he's going
2 to give a warrant to his -- some just call in a police
3 officer and say I want you to execute this warrant. He
4 doesn't know anything about the probable cause. He
5 just says he's mandated to carry out the warrant.

6 MR. DREEBEN: Well, I -- I think in the
7 ordinary instance, it would be reasonable for the team
8 of executing officers to be responsible for the inquiry
9 that I'm talking about and any individual officer --

10 JUSTICE KENNEDY: Well, there's no -- there's
11 no authority for that. I -- I thought warrants were
12 issued to police officers all the time without knowing
13 the -- the precise reason. It's to search the house to
14 try to find X, and the warrant speaks for itself. A
15 judge has made that determination.

16 MR. DREEBEN: Well, the warrant is obtained
17 based on an affidavit by --

18 JUSTICE KENNEDY: I mean, if you want us to
19 write the opinion with this qualification in it, it
20 seems to me that you're making a big change in the way
21 search warrants are used.

22 MR. DREEBEN: Oh, I don't think it's a big
23 change at all, Justice Kennedy, and I -- I think what
24 I'm trying to make clear here is that there's an
25 ongoing obligation of reasonableness. Certainly the

1 Court does not have to get into that in this case to
2 decide it --

3 JUSTICE SOUTER: But -- but, Mr. Dreeben,
4 there's an ongoing obligation of reasonableness in the
5 manner of which the -- in -- in the manner in which the
6 search is carried out. But unless every officer who --
7 who acts under the authority of the warrant is aware of
8 the probable cause evidence and can make a judgment
9 when that evidence either is stale or, in this case,
10 has not yet ripened, then in fact there is no way for
11 an officer to make that kind of what you're calling the
12 reasonableness judgment in the execution of the
13 warrant. He simply doesn't have the factual background
14 for it, and that's where the timing -- we'll call it --
15 the timing clause comes in because at least an officer
16 who may not know the probable cause behind it all -- at
17 least an officer who has a warrant that says, you may
18 search between times X and Y, or a warrant that says,
19 upon the occurrence of event X and time Y, has a -- a
20 rough and sound idea of when he can act. But if that's
21 not in the warrant, the officer cannot make that
22 judgment. He doesn't know the probable cause
23 necessarily and he doesn't know the time.

24 JUSTICE GINSBURG: The affidavit -- wasn't
25 the affidavit available to the executing officer?

1 MR. DREEBEN: Well, in this case, Justice
2 Ginsburg, the -- the affidavit was on the scene. The
3 affiant who secured the warrant was the lead agent who
4 was in charge of the search that was carried out. The
5 search team had been briefed on the probable cause and
6 the -- the contents of the affidavit and the -- the
7 items that were to be searched for and when the search
8 was to take place. All of those things were true.

9 The district court also found that the
10 affidavit, which does contain the triggering condition
11 in two different places, was incorporated into the
12 warrant. The search warrant itself refers to the
13 attached affidavit. So the documents --

14 JUSTICE SOUTER: It -- it was -- I take it it
15 was, in fact, not attached but it was somewhere on the
16 premises.

17 MR. DREEBEN: It was not -- it was not
18 physically attached. It was in the possession --

19 JUSTICE SOUTER: So an officer who picked up
20 the warrant would not be able to tell necessarily. If
21 he said, hey, has somebody got the affidavit, they
22 could have brought it forward and he could have found
23 out. But if -- if somebody didn't know where the
24 affidavit was, he wouldn't have any way of knowing.

25 MR. DREEBEN: Well, in the abstract, I

1 suppose that that's right, but in -- in the concrete
2 circumstances of this case -- and I think it's
3 consistent with what I was trying to explain is
4 reasonable search warrant execution -- all of the
5 search team was fully familiar with the process that
6 was going on. This -- this was a controlled delivery
7 in which postal inspectors were arranging themselves to
8 make a delivery to the premises of the videotape in
9 question. Everyone on the search warrant team knew
10 that until that item had been received and taken inside
11 the house, there would be no warrant execution. And in
12 fact --

13 CHIEF JUSTICE ROBERTS: Well, but the facts
14 of the triggering event are not always going to be so
15 clean, and in many cases they're going to require an
16 exercise of judgment by the officer. I mean, if the
17 triggering event is a, you know, delivery of a bale of
18 marijuana or something and they see a big box coming
19 in, they're going to have say, well, is that what
20 they're talking about or is -- you know, is that it.
21 And the point is under the Fourth Amendment that those
22 types of judgments are supposed to be made by the
23 magistrate and not by the officers on the scene.

24 MR. DREEBEN: Well, I don't think that is the
25 point of the Fourth Amendment. I think what the point

1 of the Fourth Amendment is is that the magistrate judge
2 makes a determination whether the facts that are
3 submitted to him rise to the level of probable cause.
4 And then the magistrate writes a warrant that's
5 consistent with what the Fourth Amendment says in terms
6 the Warrant Clause requires. Then the police officers
7 have to be reasonable in executing it. That was really
8 my only point at the outset of the colloquy that I had
9 with Justice Kennedy and with Justice Souter.

10 And the classic example that I think shows
11 that certainly officers may use discretion in what they
12 do in determining whether it's certain types of
13 triggering conditions are met are wiretaps because
14 wiretaps are issued on the basis that there is probable
15 cause to believe that criminal conversations will occur
16 in the future. The officers then have the
17 responsibility to conduct appropriate electronic
18 surveillance that acquires the criminal conversations
19 but not other conversations that are not within the
20 scope of the probable cause that they've obtained.

21 JUSTICE SOUTER: Yes, but doesn't that simply
22 -- isn't the analogy there that when a -- when a search
23 warrant says you may -- you may pick up implements of
24 drug traffic, all it covers is drug traffic. It
25 doesn't cover coffee, tea, and -- and milk. In -- in

1 the case of the electronic surveillance, they're
2 supposed to record criminal conversations and -- but
3 not others.

4 MR. DREEBEN: Well, the point, Justice
5 Souter, is that they have to make a judgment that
6 criminal conversations are what is going to be
7 intercepted.

8 JUSTICE SOUTER: But those -- those are
9 judgments about facts that they are finding. They are
10 not judgments about probable cause or the moment at
11 which the warrant becomes valid.

12 MR. DREEBEN: Well, they're -- they're not
13 judgments here about probable cause either because the
14 magistrate has --

15 JUSTICE SOUTER: Well, it is. The -- the
16 moment -- the triggering event is the event that
17 determines that the probable cause determination is, in
18 fact, true now.

19 MR. DREEBEN: Well, that's a separate
20 question, and I think the magistrate's question is, is
21 there probable cause? He doesn't have to determine
22 that the probable cause is true.

23 JUSTICE SOUTER: And his judgment, though, is
24 there will be probable cause when the triggering event
25 occurs.

1 MR. DREEBEN: That's right.

2 JUSTICE SOUTER: And so the triggering --

3 MR. DREEBEN: No. I actually, Justice Souter --

4 JUSTICE SOUTER: -- the triggering event has
5 a probable cause implication, which the selection of
6 objects to be seized does not have.

7 MR. DREEBEN: I -- I have to say that I
8 disagree fundamentally with the suggestion that he's
9 saying there will be probable cause when the triggering
10 event occurs. He's saying, based on the facts that are
11 submitted to me now, the probabilities are such that
12 evidence of this crime will be on the property when the
13 warrant is executed.

14 JUSTICE SOUTER: Well, he's saying two
15 things. There is probable cause to believe that what
16 we're calling the triggering event will occur, and
17 there is probable -- and when that triggering event
18 occurs, there will be probable cause to believe that
19 evidence of a crime may be found and seized at such and
20 such a place. There are two determinations.

21 MR. DREEBEN: Well, I -- I don't think that
22 there's any reason linguistically to prefer your
23 formulation, Justice Souter, to the formulation that
24 says there's probable cause to believe now that when
25 the warrant is executed, in accordance with the

1 triggering condition's occurrence, the property will be
2 found.

3 JUSTICE KENNEDY: Of course, that's not what
4 the -- what the warrant says. The warrant says I'm
5 satisfied that the person or the property so described
6 is now concealed on the premises.

7 MR. DREEBEN: Well, Justice Kennedy, I think
8 the warrant should be read as a whole and not, as this
9 Court has indicated in many cases, a technical sense.
10 This search warrant, which is at page 47a of the
11 petition appendix, specifically refers to the attached
12 affidavit. And the district court found as a fact that
13 the warrant was intended to incorporate the affidavit.
14 The affidavit states quite explicitly in two different
15 places that it would not be executed until the
16 triggering event occurred, and it also makes clear that
17 the triggering event was the delivery of the videotape
18 that respondent --

19 JUSTICE STEVENS: The affidavit itself says
20 there is now concealed a certain person or property.
21 He checked the wrong the box --

22 MR. DREEBEN: Well, I think the -- that is
23 correct, too, because this --

24 JUSTICE STEVENS: If you read the whole
25 affidavit, you know it doesn't mean what it says there.

1 MR. DREEBEN: I think that not only do you
2 know that the -- this was clearly intended to be an
3 anticipatory warrant as to the videotape, but it also
4 authorized the search for other items that were related
5 to --

6 JUSTICE STEVENS: May I ask you this
7 question? With a warrant to conduct a wiretap, does
8 the warrant just merely specify the telephone number
9 and the time at which the -- the officer may listen, or
10 does it have anything to do with what -- what -- the
11 content of the -- of the conversation?

12 MR. DREEBEN: Wiretaps, Justice Stevens, are
13 regulated extensively by Federal statute, and under
14 Federal statute, a wiretap order contains a myriad of
15 details that are not specified by the Fourth Amendment.
16 Among those details are the crimes that are being
17 investigated and the time period of --

18 JUSTICE STEVENS: No, but I mean in
19 describing the authority of the investigating officer
20 to execute the warrant, does it describe it just in
21 terms of a physical number that can be listened, or one
22 or more numbers, plus a time period, or does -- does it
23 say you may listen only when he's talking about foreign
24 affairs or --

25 MR. DREEBEN: It specifies the crimes that

1 are being investigated and it contains a minimization
2 requirement which --

3 JUSTICE STEVENS: It's a minimization as to
4 what they will transcribe, isn't it?

5 MR. DREEBEN: It's a minimization as to what
6 conversations they will intercept if they listen to a
7 conversation and determine that it falls outside the
8 scope of what they're authorized to intercept. Many of
9 the calls that -- that are intercepted in these kinds
10 of wiretaps require a considerable amount of judgment
11 and discretion. Are the individuals talking in code?
12 Are they talking about crimes in an oblique way that
13 pertain to the subject of the warrant, or are they
14 really having innocent conversations? And the officers
15 can listen in long enough to make that determination.
16 If they determine that it's a clean call, they have to
17 minimize and terminate their interceptions.

18 JUSTICE SCALIA: Mr. Dreeben, could -- could
19 I ask you if the Government would -- would defend a --
20 an anticipatory warrant in these circumstances? The
21 postal inspectors know that the unlawful video has been
22 put in the mail and they know that it -- it is going to
23 one of 17 individuals. They're not sure which one of
24 the 17. So they go and get a warrant that says, you
25 know -- and -- and it will be obvious in my hypothesis

1 that the delivery of the video has occurred. So can
2 they get a warrant that says you can go in -- it lists
3 all of these 17 people. And it says you can go into
4 their premises as soon as you see delivery of the
5 video. Would -- would you support that kind of an
6 anticipatory warrant?

7 MR. DREEBEN: Justice Scalia, I -- I would
8 certainly with respect to search of common areas. For
9 example, this was a delivery to some sort of a --

10 JUSTICE SCALIA: Well, then -- then -- well,
11 I'm sorry to hear you say that because then you are
12 really not saying that there has to be probable cause.

13 MR. DREEBEN: No. I'm saying that there
14 would be --

15 JUSTICE SCALIA: Because at the outset
16 there's no probable cause to believe that any one of
17 those 17 -- unless you think one-seventeenth is enough
18 for probable cause.

19 MR. DREEBEN: Well, I think one-seventeenth
20 is pushing it for probable cause --

21 JUSTICE SCALIA: Yes.

22 MR. DREEBEN: -- which is why my answer was
23 as to the common area. Certainly they can get a
24 warrant that says we know that there's an item that
25 represents evidence of a crime and that it's going to

1 be at a particular location upon delivery and we can go
2 in and search that location.

3 JUSTICE SCALIA: Yes, but I'm not talking
4 about a particular location. I'm talking about we know
5 it's going to be one of 17 -- or make it 50, if you
6 like. We don't know which of those.

7 MR. DREEBEN: Yes.

8 JUSTICE SCALIA: We want a warrant that will
9 let us go in immediately when we see it delivered.
10 Would you support that warrant?

11 MR. DREEBEN: With -- if what you're talking
12 about is invading the individual expectations of
13 privacy of -- of 50 --

14 JUSTICE SCALIA: Yes. It's in somebody's
15 home. It's into a home.

16 MR. DREEBEN: No, I -- I wouldn't because I
17 don't think that -- that one-fiftieth in those
18 circumstances would -- would be probable cause without
19 more. I -- I do think --

20 CHIEF JUSTICE ROBERTS: No, but there's no --
21 there's no probable cause until the triggering event.
22 When -- when the triggering event takes place, you've
23 eliminated the 16 others and you do know that it's --
24 it's -- there's probable cause. How is that different
25 from this case?

1 MR. DREEBEN: This case is different because
2 there -- you -- you can subtract out all of the
3 variables except will the postal officials, in fact,
4 deliver it to the place where they're saying they will
5 deliver it and they say that they're delivering it to a
6 household that has actually placed the order.

7 CHIEF JUSTICE ROBERTS: Well, that's not
8 true. Maybe the -- maybe the person decides he won't
9 accept it.

10 MR. DREEBEN: Then the -- then the warrant
11 should not be executed because this affidavit said that --

12 CHIEF JUSTICE ROBERTS: So there are a lot
13 more things than just the delivery. It's not entirely
14 controlled by you.

15 MR. DREEBEN: I think that that -- it's fair
16 to say that it's not 100 percent controlled by the
17 Postal Service, but I wouldn't say that there are a lot
18 of things that are left up in the air or that there's
19 any more that's left up in the air than in the kind of
20 experience that goes on in installing a wiretap.
21 Justice --

22 JUSTICE GINSBURG: Well, what -- what -- take
23 this variable. The -- the warrant can be executed when
24 the item is taken into the house, if I remember what it
25 said. Suppose the defendant is sitting on a porch,

1 sees the postal carrier, gets up, takes the package,
2 and proceeds to walk down the street, and never enters
3 the house. Could the warrant be executed?

4 MR. DREEBEN: Not under this warrant because
5 it was secured by an affidavit that represented that it
6 -- the warrant will not be executed unless and until
7 the item is taken inside the house. And so the agents
8 assumed the risk, so to speak, that the event that you
9 described, Justice Ginsburg, would occur, and under
10 those circumstances, the search wouldn't take place.

11 Presumably under those circumstances an
12 arrest would take place. A search would take place
13 incident to the arrest of the individual. The
14 videotape would be found, and the Government would have
15 acquired the evidence that it's looking for, which is
16 evidence with jury appeal that this individual has, in
17 fact, received child pornography through the mail.

18 And it's important to recognize that in this
19 case there was ample probable cause that respondent had
20 attempted to receive child pornography through the mail
21 before the triggering event even took place, and had
22 the agents wished to, they could have procured a
23 warrant, a conventional warrant, so to speak, at that
24 time that allowed the --

25 JUSTICE SCALIA: Yes, but you don't want us

1 to decide the case on that ground. I mean --

2 MR. DREEBEN: Well, I don't think this was
3 such a warrant, Justice Scalia. I'm -- I'm just
4 pointing out that there was a chain of events that
5 supported probable cause to a very strong degree and
6 the triggering event represented that until the actual
7 delivery had taken place and the item was brought in
8 the house, the search wouldn't take place.

9 CHIEF JUSTICE ROBERTS: Could you elaborate
10 just a little bit for me on why you think this case is
11 different from Justice Scalia's hypothetical with the
12 17 people? Because my concern is there -- here you say
13 once the triggering event takes place, then you do --
14 the probable cause comes to fruition or whatever. How
15 is that different than his hypothetical?

16 MR. DREEBEN: It's -- it's fundamentally
17 different. This case is fundamentally different from
18 that hypothetical because the measure of probable cause
19 at the time the warrant is issued is very weak under
20 Justice Scalia's hypothetical. One out of 17 is
21 pushing the envelope. One out of 50, at least absent
22 some extraordinary national emergency, is probably well
23 outside the envelope for saying we have probable cause
24 to go into any particular place.

25 Justice Scalia's hypothetical illustrates

1 that the emergence of later facts can make it very
2 clear that the agents can go in and get probable cause
3 at that moment, but this case is fundamentally
4 different because the agents have probable cause based
5 on probabilities.

6 JUSTICE SCALIA: It is probable that this
7 package will be delivered to this individual. That
8 probability exists at the time that the warrant is --
9 is issued.

10 MR. DREEBEN: That's right.

11 JUSTICE SCALIA: And that's the probable
12 cause you're relying on.

13 MR. DREEBEN: That's right.

14 JUSTICE SCALIA: It is probable that this
15 package will be delivered to this individual.

16 MR. DREEBEN: That's right. And those fact --

17 JUSTICE STEVENS: But that probability does
18 not support the truth of the statement that the person
19 or property so described is now concealed at the place
20 for the issuance of the warrant.

21 MR. DREEBEN: Well, I -- I think this takes
22 me back to the fact that this warrant, number one,
23 should be construed as a whole and not -- not by virtue
24 of which box was checked and, number two, that there
25 were many items that were specified in the warrant that

1 -- and the warrant application that the agent had
2 reason to believe were then concealed at the time. So
3 this was really a case where the form warrant was
4 inadequate to the -- to describe fully and accurately
5 what was going on.

6 JUSTICE STEVENS: Of course, if the -- if the
7 stuff was already there that supports the warrant and
8 the search, we don't even reach the question of a -- of
9 the anticipatory warrant.

10 MR. DREEBEN: Well, I think you do in --

11 JUSTICE STEVENS: I should say I -- I've
12 approached the case on the assumption that the only
13 thing we're worried about is whether -- whether the
14 anticipatory part is okay.

15 MR. DREEBEN: And that is --

16 JUSTICE STEVENS: But it doesn't seem to me
17 to be a fair response to say, well, we had other
18 grounds for --

19 MR. DREEBEN: No. It's a -- it's a fair
20 response into -- on how the warrant was drawn and why
21 the statements that were made are not laughably wrong.
22 They -- they are partially inaccurate because the
23 videotape was clearly not on the premises at the time.
24 They are partially right in that other evidence of
25 child pornography distribution was.

1 But this case -- and, Justice Stevens, I
2 quite agree with you. This case only concerns the
3 triggering condition because that --

4 JUSTICE STEVENS: But -- but you would defend
5 the warrant even if the only thing they were looking
6 for was the stuff delivered at the -- at the time.

7 MR. DREEBEN: Yes, and that's the only thing
8 that's before the Court.

9 JUSTICE STEVENS: And as to that aspect of
10 it, the warrant is incorrect.

11 MR. DREEBEN: Yes.

12 JUSTICE STEVENS: The warrant itself.

13 MR. DREEBEN: The -- the box on the warrant
14 is. Again, I think that you need to --

15 JUSTICE STEVENS: Well, it's not really a
16 box. I am satisfied, et cetera, the property so
17 described is now concealed on the premises.

18 MR. DREEBEN: The same response that I gave
19 to Justice Kennedy. The magistrate found that the
20 warrant, the form of -- that constitutes the warrant,
21 incorporated the attached affidavit, and the attached
22 affidavit makes clear exactly what the agent had in
23 mind.

24 There is an alternative point here that I
25 want to make before I reserve the remainder of my time

1 for rebuttal, and that is the Ninth Circuit's position,
2 even if the Ninth Circuit were correct that the
3 triggering condition needs to be in the warrant, should
4 still not lead to the suppression of evidence because
5 although the Government's submission is that the
6 triggering condition is not required by the
7 Particularity Clause, if some other doctrine under the
8 Fourth Amendment did require it to be in the warrant,
9 the warrant should be treated as one that is at most
10 overbroad as to the time of permissible execution.
11 That is, on its face it would authorize the warrant to
12 be executed from the moment of issuance until 10 days
13 after issuance instead of from the moment that the
14 triggering condition is satisfied until 10 days after
15 issuance.

16 When courts have confronted overbroad
17 warrants, what they have done is ask is there probable
18 cause that supports part of this warrant. If the
19 answer to that is yes, the next question is, is the
20 evidence that's sought to be suppressed acquired under
21 the part of the warrant that was validly supported by
22 probable cause? If the answer to that is yes, there's
23 no suppression. The warrant is, in effect, severed and
24 the only suppression that can be obtained is as to
25 evidence that was secured by execution of the part of

1 the warrant that's not supported by probable cause.

2 Here, there was ample probable cause to
3 support the magistrate judge's conclusion that after
4 the triggering condition was satisfied, the videotape
5 would be on the premises. The warrant was not executed
6 until after the delivery of the videotape took place,
7 and therefore, there was no deficiency in the
8 correlation between probable cause showings that were
9 made to obtain the warrant and the time at which it was
10 executed. And the result is that there should be no
11 suppression of evidence.

12 If I may save the rest of my time for
13 rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 Dreeben.

16 Mr. Reichel.

17 ORAL ARGUMENT OF MARK J. REICHEL

18 ON BEHALF OF THE RESPONDENT

19 MR. REICHEL: Mr. Chief Justice, and may --
20 may it please the Court:

21 I'd like to begin with noting that, Mr. Chief
22 Justice, you highlighted a specific concern with
23 anticipatory warrants and a specific concern specific
24 to this type of case.

25 A discussion was -- was had about triggering

1 events are commonly not so clean. It requires a lot of
2 judgment to be made by the officer in the field. There
3 are not only examples in the case law, but I speak from
4 my own experience as a public defender of many years
5 that there are many examples that occur often in the
6 courtroom. Specifically a triggering condition may
7 allow for the search of a home after a suspect sells
8 narcotics to an officer, but what will happen is the
9 suspect will take the money from the officer and then
10 have to go to another residence to get the narcotics,
11 not the residence that the magistrate and the officer
12 believe he would get them from. As a result, he has to
13 make a determination at that point whether the
14 triggering condition has been satisfied.

15 JUSTICE SCALIA: Mr. Reichel, it -- it seems
16 to me it's part of your case that the probable cause
17 must be in existence at the moment the warrant is
18 issued and that the magistrate cannot take into account
19 the passage of time. Are you --

20 Suppose that -- that policemen apply for a --
21 a warrant in Manhattan which is to be served in
22 Brooklyn, and it's going to -- it's going to take half
23 an hour to get there. Everybody knows it's going to
24 take half an hour. And the probable cause that they
25 come up with is they know that this mob leader is going

1 to be in this apartment between 6:30 and 6:45. Okay?
2 And they present the warrant to the magistrate at -- at
3 6 o'clock. It will take half an hour to get to
4 Brooklyn. The magistrate knows that when it's served,
5 the mob leader will be in this apartment. Can that --
6 can that warrant issue?

7 MR. REICHEL: Yes, because the magistrate has
8 determined that there's probable cause to believe that
9 at the time of the search, the contraband, the purpose
10 of the search, will be present in that particularly
11 described location.

12 JUSTICE SCALIA: Right, and -- and likewise,
13 it -- it would work the other way. If the magistrate
14 had the same facts, the -- the mob leader is going to
15 be there between 6:30 and 6:45, and the warrant is
16 presented to him at 6:30, he would have to decline it
17 because he knows by the time it's served, it's -- it's
18 going to be gone. Right?

19 MR. REICHEL: That is correct.

20 JUSTICE SCALIA: So the magistrate is always
21 looking to the condition when -- when the warrant is
22 executed, and that's all that's happening here. There
23 is probable cause to believe that this person will be
24 receiving contraband. There is probable cause to
25 believe it because he sent for it and it was mailed to

1 him. It's just a matter of waiting till it gets there.

2 There is probable cause to believe that he will
3 receive it. And all you're doing is predicting in the
4 future, saying the probable cause doesn't exist now,
5 but it exists when the warrant will be executed. I
6 don't see -- I don't see any real difference between
7 that and the -- and the mob leader example I just --

8 MR. REICHEL: Justice Scalia, what the
9 magistrate is predicting is that there will be receipt,
10 but the magistrate is -- is not predicting that there
11 will be contraband inside of that house at that point.
12 He's actually shipping that discretion to the officer
13 in the field.

14 JUSTICE SCALIA: No, but it's probable. At
15 the time that he issues the warrant, it is probable
16 that this person will be receiving contraband because
17 they showed, you know, this guy sent for it. He sent
18 for the -- these child pornography films in -- in a --
19 you know, a Postal Service rouse, and we mailed it to
20 him. It's probable that he's going to be receiving it.

21 MR. REICHEL: It is probable that he's going
22 to be receiving it. However, what occurred -- what --
23 the -- the problem that occurs in such a situation is
24 that is that the warrant issuing process itself, which
25 is part of the machinery of government -- the actual

1 process of issuance is completed with anticipatory
2 warrants by the officer in the field. It's not fair to
3 say that the warrant has been issued and the magistrate
4 provides it to the officer. At that point, it's not a
5 valid warrant. A warrant cannot be issued if it's not
6 valid by definition. So what you have --

7 JUSTICE GINSBURG: Mr. Reichel, one of the
8 concerns about the position you're taking, the
9 alternative would be that the police officer, expecting
10 that this package is going to be delivered at a certain
11 time, is on the lookout for it. He sees the post
12 officer approaching, calls on his cell phone to get an
13 emergency warrant, let's say. The magistrate will not
14 be nearly as well informed as he was when he was
15 presented with -- was it a 64-paragraph affidavit? So
16 the magistrate knows that the whole deal -- he can't
17 possibly know it if he's got -- got a telephone call on
18 an urgent basis. So if you want the magistrate's
19 judgment rather than the police officers' on the spot,
20 then it makes much more sense to have the magistrate
21 get a detailed picture of what's going on and decide
22 whether or not he'll issue the warrant.

23 MR. REICHEL: That is correct, and I'm --
24 and, Justice Ginsburg, that's why telephonic warrants
25 are simple and easy, one of the many alternatives to

1 anticipatory warrants, which do not require any --

2 JUSTICE GINSBURG: But I just -- I made the
3 opposite argument, that a telephone warrant has to be
4 done on the basis of minimum information. The officer
5 -- the magistrate will have a detailed affidavit when
6 it isn't on an emergency basis. He -- he will have, as
7 he did in this case, an affidavit with 64 paragraphs
8 explaining the whole deal, how it was set up. So isn't
9 -- isn't there greater security if you could have a
10 magistrate with time to think, well, is there really
11 probable cause than to have the magistrate make that
12 judgment on a -- such a quick basis?

13 MR. REICHEL: Yes, there is, Justice
14 Ginsburg. And the procedure -- the most appropriate
15 procedure is the duplicate warrant whereby the
16 magistrate, satisfying all the concerns Your Honor has
17 expressed, has this warrant. As to the final matter,
18 the final determination of probable cause, he receives
19 a call from the officer. There's an agent with the
20 magistrate at the time. He advises what's just
21 occurred. He can advise he took the package but did
22 not go in the house. He took the package and did go in
23 the house. The magistrate has the 64-page affidavit,
24 is all prepared now. He can advise the officer to sign
25 off on it, that it's okay to search now. He signed

1 that --

2 JUSTICE GINSBURG: So there has to be -- when
3 does he get the -- when does the magistrate get the
4 affidavit?

5 MR. REICHEL: Well before the delivery of the
6 package in such a circumstance, Your Honor. They bring
7 a duplicate -- a duplicate warrant to the magistrate
8 who -- and they -- and there's an agent who stays with
9 the magistrate. They then control -- are in complete
10 control at this point of the contraband.

11 JUSTICE O'CONNOR: Mr. Reichel, did you take
12 the position in the proceedings below that anticipatory
13 warrants are invalid?

14 MR. REICHEL: No, Your Honor.

15 JUSTICE O'CONNOR: No.

16 And did you raise the issue in your response
17 to the petition for certiorari?

18 MR. REICHEL: No, Your Honor.

19 JUSTICE O'CONNOR: No.

20 But you want us to address it now. I mean,
21 you -- you make a big deal of the notion that there's
22 no such thing as an anticipatory warrant. And yet,
23 it's never been addressed below. It wasn't addressed
24 by the court below.

25 MR. REICHEL: Your Honor, if I -- Justice

1 O'Connor, if I can elaborate. It was raised in the
2 district court, and in fact, I believe it's in the
3 joint appendix. Excuse me. It's in the cert petition
4 at page 36a, which I think is appendix D, where the
5 district court finds that they're permissible, and he
6 cites Weber and Hale. And the district judge at that
7 point made a final determination for the litigation in
8 the district court that they were permissible and they
9 were lawful in all circumstances.

10 I did not -- the matter on appeal to the
11 Ninth -- the court of appeals on appeal, the more surer
12 course that we thought for reversal would be the
13 failure of particularity of these types of
14 requirements.

15 But the most important point is I do believe
16 it's fairly included in the question presented before
17 this Court. Several examples, long discussion, lots of
18 confusion about what must -- what procedure must take
19 place with anticipatory warrants I think calls out for
20 the inferior courts to hear from this Court what those
21 requirements are. To answer what those requirements
22 are, this Court must answer whether they're
23 constitutional --

24 JUSTICE SCALIA: Can I --

25 JUSTICE BREYER: I don't see --

1 JUSTICE SCALIA: -- can I take you through my
2 -- a variation of my earlier hypothetical? You say
3 that the magistrate can issue the warrant at 6 o'clock,
4 although he knows that there really won't be the
5 probable cause until 6:30. You say that would be
6 valid. He could issue it in Manhattan knowing that it
7 wouldn't be served in -- in Brooklyn until 6:30.

8 What if the magistrate specified that out of
9 an abundance of caution? It's just the same case, but
10 he writes on the warrant, this warrant is not to be
11 served until 6:30. Does that make it invalid?
12 Whereas, it was valid before, it's not valid if he --
13 if he says I am anticipating what will be the situation
14 when the warrant is executed. He says it explicitly,
15 it can't be served until 6:30. Does that make it bad?

16 MR. REICHEL: Textually he -- textually under
17 the language of the Fourth Amendment, he cannot issue
18 the warrant for service at 6:30 when probable cause --

19 JUSTICE SCALIA: Doesn't it strike you as --
20 as strange that it's perfectly okay if he issues it at
21 6 o'clock, knowing that it'll be -- won't -- that there
22 isn't probable cause now, but there will be at 6:30
23 when it will be served. You say that's perfectly okay.
24 But if he says it on a warrant, not to be served until
25 6:30, it suddenly becomes bad.

1 MR. REICHEL: If it -- if it is textually
2 okay, if the warrant is valid under the Fourth
3 Amendment, that it must be clearly stated that the time
4 and the -- and the significant limit on the officer's
5 power to search is the time of 6:30, that must be
6 clearly stated on the warrant to satisfy the
7 Particularity Clause of the Fourth Amendment.

8 JUSTICE SCALIA: Oh, I see. So -- so you say
9 so long as you say something as clear as 6:30, that's
10 okay. It cannot be served until 6:30.

11 MR. REICHEL: It must be on there. It is a
12 requirement under the Particularity Clause that it must
13 be on there for the officer --

14 JUSTICE GINSBURG: Where -- where is time? I
15 know that the Fourth Amendment says persons and places.
16 Where does it say time is one of the particulars?

17 MR. REICHEL: It is inherent. It is inherent
18 in that language. It is backed up -- clearly it is
19 backed up by the purposes behind the Particularity
20 Clause. If a warrant -- the probable cause -- the --
21 the two clauses in the Warrant Clause, the probable
22 cause, is constitutionally I believe joined at the hip.
23 It is textually joined with the objects of the search,
24 the place to be searched, and the -- and the persons to
25 be searched. And as a result --

1 JUSTICE GINSBURG: I think time -- time is
2 certainly relevant to probable cause, but the -- the
3 Fourth Amendment says what you have to identify with
4 particularity are places and the items and the person.
5 Person, things, and place. It doesn't say time, but
6 you say that's inherent. Have we -- are there
7 decisions of this Court that say time goes to the
8 particularity requirement?

9 JUSTICE O'CONNOR: Let me give you another
10 example. There are search warrants for wiretaps, are
11 there not?

12 MR. REICHEL: Yes.

13 JUSTICE O'CONNOR: And they are often
14 anticipatory. They aren't issued because the suspect
15 is now using the phone, but because it's anticipated in
16 the future the suspect will use the phone at some point
17 and there's probable cause to believe, if -- if the
18 suspect does, there may be evidence of a crime. I
19 mean, anticipatory warrants are just inherent in the
20 system. I don't -- I just don't think your argument
21 follows from precedent.

22 MR. REICHEL: Thank you, Your Honor. Justice
23 O'Connor, I do know that the -- that wiretap statutes
24 came about only after three important decisions from
25 this Court: Ker v. California, Katz, and Berger. And

1 in -- in those opinions, they dealt -- they dealt very
2 strongly with the Particularity Clause of the Fourth
3 Amendment and wiretap restrictions. Thereafter, there
4 were extensive congressional hearings on wiretaps and
5 the final result was a very carefully drafted statute
6 that allowed for wiretap, subject to -- to very
7 stringent conditions, specifically enumerated --
8 enumerated crimes and specific circumstances, but
9 additionally, notice to the homeowner --

10 JUSTICE O'CONNOR: Well, the Constitution
11 still applies to it, and they are inherently
12 anticipatory.

13 MR. REICHEL: And I -- and I believe that
14 wiretap laws -- the wiretap laws require a showing of
15 present probable cause, not probable cause in the
16 future. But there is criminality ongoing at this time.

17 JUSTICE O'CONNOR: Probable cause that there
18 -- this is somebody who's going to use a certain
19 telephone number and that there may be reason to
20 suspect a crime will be discussed.

21 MR. REICHEL: I believe this Court announced
22 in --

23 JUSTICE O'CONNOR: And -- and this is no
24 different than that.

25 MR. REICHEL: I believe in -- in -- this

1 Court announced, Justice O'Connor, in the Berger
2 opinion that for a wiretap warrant to be authorized
3 under the Fourth Amendment, there must be a crime
4 undertaken, presently being committed, or about to be
5 committed, additional evidence of a crime that's
6 already been committed. There is present probable
7 cause. And it also, I do not believe, vests the
8 discretion in the officers to completely control when
9 probable cause will occur.

10 JUSTICE SCALIA: I mean, the conversation is
11 not occurring right now. The magistrate has to say in
12 the future, when this warrant is executed, the
13 conversation probably will be occurring. Right? And
14 so also here. You know, the -- the receipt is not
15 occurring now, but on the basis of all of the evidence
16 before me, I think that that receipt will be occurring.

17 MR. REICHEL: Justice Scalia, I believe that
18 wiretaps are different for a few reasons. First of
19 all, I do not believe they could have been foreseen by
20 the Framers of the Fourth Amendment. As a result, more
21 pragmatic modern approaches for law enforcement's needs
22 must be taken into consideration. But additionally --

23 JUSTICE STEVENS: I'm not sure the Framers
24 used controlled deliveries either.

25 (Laughter.)

1 MR. REICHEL: I agree, Your Honor.

2 JUSTICE BREYER: All right. I -- I have a
3 question that you could just clarify a confusion. You
4 want to bring into this case the question of whether or
5 not anticipatory warrants are ever valid. I had a case
6 in the First Circuit where I explained my view on that.

7 I thought they would be reasonably described. So I
8 don't know if that issue should be brought up here.
9 Maybe.

10 I can't figure out what issue should be
11 brought up here. There's a Van Treska case that says
12 we ought to read these things in a common sense
13 fashion. All right?

14 I read it. My common sense says I have a
15 warrant here. It says nothing about anticipatory
16 anything. It says you can go and search for any of 16
17 items, 14 of which are in his house well before the
18 delivery. After all, he's had all this correspondence
19 with these people about child pornography. They have
20 terrific reason for thinking he might have some. And
21 that's all it says. And then it says, is there
22 probable cause for a warrant that says go in any time
23 now and search for any of these items, including what
24 will be delivered, if that's when you do it?

25 I say I look at the probable cause. His

1 probable cause is he thinks that another package is
2 being delivered, and he's right to think it. Now,
3 whether it is delivered or not doesn't add anything
4 really to the issuance of the warrant. It might add to
5 his personal confidence. But that's my common sense
6 opinion. The common sense is the only question here is
7 do they have probable cause to issue a warrant that
8 allows them to search now, because that's what it says.

9 So now how -- how, given that -- I grant you
10 the Ninth Circuit went into all kinds of other things,
11 but you explain to me, please, how I'm supposed to
12 reach those other things and what I'm supposed to do,
13 and why I'm wrong.

14 MR. REICHEL: Thank you, Justice Breyer.

15 The particularity requirement requires
16 specificity on the purposes behind the particularity
17 requirement in the warrant itself and not in some other
18 documents or supporting documents elsewhere.

19 JUSTICE BREYER: Oh, no, it's not supported.
20 It's specific. It says go to Jeffrey Grubbs'
21 residence and then it has an attachment A which
22 describes it with great specificity. And go and search
23 for and seize the records and materials described in
24 attachment B, and then we have 16 different kinds of
25 items with great specificity. That's it. That's the

1 end of this warrant, and that's what it says to do, and
2 that's what he did. And then he has a different
3 affidavit which gives him the probable cause for
4 issuing the warrant I just described.

5 MR. REICHEL: Justice -- Justice Breyer, it
6 says that they may enter into that house, but only upon
7 the occurrence of a significant event, a specific
8 occurrence.

9 JUSTICE BREYER: Where does it say that?

10 MR. REICHEL: That is in the affidavit --

11 JUSTICE BREYER: No, no. I'm reading the
12 warrant. I'm not reading the affidavit. It happens to
13 say that the affidavit is -- that that affidavit is --
14 it's in appendix A, appendix B, but it doesn't say
15 anything about going in on -- where does it say that?

16 MR. REICHEL: Well, it --

17 JUSTICE BREYER: It says -- mine says, you
18 may command to search on or before April 27th for 10
19 days the person/place named and make the search in the
20 daytime between 6:00 and 10:00. That's what mine says.

21 MR. REICHEL: Justice --

22 JUSTICE BREYER: Then there's an affidavit
23 about probable cause. That's true. So --

24 MR. REICHEL: Justice Breyer, I think that
25 highlights and it supports the court of appeals

1 decision in this case, specifically because if it's not
2 stated on the face of the warrant, such as --

3 JUSTICE BREYER: What's not stated?

4 MR. REICHEL: The limit on the officers'
5 power to search.

6 JUSTICE BREYER: Where is there a limit?

7 MR. REICHEL: Their limit is in the
8 triggering event. It is an anticipatory warrant which
9 is written at the top.

10 JUSTICE BREYER: It is?

11 MR. REICHEL: Yes.

12 JUSTICE BREYER: What is it that tells us
13 that? I just happened to read an affidavit where the
14 -- the person says that he won't enter until this
15 package is there, but there are a lot of cause I would
16 think --

17 JUSTICE SCALIA: Doesn't the Government
18 concede this point? I had thought the Government
19 conceded that this warrant would not have been validly
20 executed if they went in before the triggering event.
21 Otherwise, there's no purpose in putting in the
22 triggering event. Maybe we'll have to get the
23 Government to -- to state that explicitly, but that --
24 that's my understanding, that they acknowledge this
25 warrant would not have been validly executed if they

1 went in before the triggering event occurred.

2 If that's not the case, I agree. I don't
3 know why we took the case.

4 (Laughter.)

5 MR. REICHEL: That is correct, Justice
6 Scalia.

7 And, Justice Breyer, the limitation for the
8 officer is a significant matter. It is the only thing
9 that gives him the --

10 JUSTICE BREYER: Well -- well, he says in his
11 affidavit he's not going to execute it until this
12 package is delivered, but that -- if I read it in a
13 common sense way, say, of course, he isn't going to
14 because he wants to get everything at once. But after
15 all, he's in the place. I would say there's a lot of
16 probable cause for him to looking for 12 of these items
17 which are there whether this package is there or not.
18 Of course, he's not going to execute it till later.

19 JUSTICE STEVENS: But, of course, if you take
20 that view, why did they bother to put the words,
21 anticipatory search warrant, on the document? That's
22 what we're fighting about. If we decide it on your
23 ground, we never should have taken cert.

24 JUSTICE BREYER: Maybe that's the answer.

25 MR. REICHEL: I believe the particularity

1 requirement also does not assume that the officers
2 seeking the warrant will be the officers serving the
3 warrant.

4 CHIEF JUSTICE ROBERTS: What else is there in
5 this joined at the hip particularity requirement? The
6 number of officers? Which officers, FBI agents or DEA
7 or something else? I mean, you're -- you're adding to
8 the text of the amendment, and I just wonder what else
9 is added under your view.

10 MR. REICHEL: Mr. Chief Justice, I believe
11 they are joined at the hip because the -- the
12 particularity requirement --

13 CHIEF JUSTICE ROBERTS: No. That's your
14 argument. I'm just saying what else is joined at -- at
15 the hip besides time. You say they don't say time.
16 They say persons to be seized and place to be searched,
17 and you say inherent in that is time. Well, what else
18 is inherent in there?

19 MR. REICHEL: If there's a -- Mr. Chief
20 Justice, if there's a significant limit on the time of
21 the execution of the warrant, then that does become
22 part of the Particularity Clause.

23 CHIEF JUSTICE ROBERTS: That's time. Is
24 there anything else that's not written there that is
25 part of that particularity requirement?

1 MR. REICHEL: Not that I -- if it is
2 significant -- if it is a significant limit on the
3 officer's power to search and if it serves the other
4 purposes of the particularity requirement, the
5 measurement of the -- providing the homeowner the
6 notice of what is going on.

7 CHIEF JUSTICE ROBERTS: Well, there's all
8 sorts of, as Mr. Dreeben explained, reasonableness. It
9 doesn't say how you enter the house, but if you
10 suddenly go in with a -- with a tank, we might find
11 that unreasonable. But that's not something that has
12 to be spelled out particularly under the terms of the
13 Fourth Amendment.

14 MR. REICHEL: Mr. Chief Justice, that's
15 correct. The reasonableness prong is separate, and I
16 think this Court has -- has long pronounced that the
17 manner of executing a warrant may offend the
18 Constitution and vitiate the legality of a search.

19 JUSTICE SCALIA: So who --

20 CHIEF JUSTICE ROBERTS: It doesn't have to be
21 spelled out in the warrant itself.

22 MR. REICHEL: The manner of entry -- the
23 method of entry does not have to be spelled out.

24 JUSTICE SCALIA: So who, what, and where
25 includes when, but it doesn't include how. Right?

1 Where -- where do you derive this proposition?

2 MR. REICHEL: I believe that not for -- for
3 all cases, I cannot answer the question, but for cases
4 of anticipatory search warrants where the officers are
5 going to finalize the issuing process, the officers are
6 completely in control of the manufacture and completely
7 in control of the completion of the delivery of the
8 contraband, and if a magistrate has allowed them to
9 make that decision in the field, that has to be clearly
10 stated to satisfy the particularity requirement on the
11 front page of the warrant so that any officer executing
12 it, not just those who -- who seek the warrant, but the
13 officer executing it, is keenly aware of his limit to
14 search. As well, it puts the homeowner on notice of
15 the other factors of the particularity requirement that
16 this has announced in --

17 JUSTICE STEVENS: May I ask --

18 MR. REICHEL: -- the Groh v. Ramirez opinion.

19 JUSTICE STEVENS: -- may I ask you this
20 question? The warrant now says it is now -- the
21 warrant says the contraband and so forth is now
22 concealed on the person or in the house. And if I
23 understand your position correctly, your first argument
24 is it should have said, will be concealed upon the
25 happening of the anticipatory event. That would have

1 -- and describe the event properly. That would have
2 satisfied the Ninth Circuit's objection.

3 MR. REICHEL: That -- that is correct,
4 Justice Stevens.

5 JUSTICE STEVENS: Now, why would that not
6 also have satisfied the objection of the warrant -- the
7 argument you make in this Court? Because it would have
8 made it clear that there is now probable cause to
9 believe it will be there at the time of the execution.
10 Why isn't that sufficient to make the warrant valid?

11 MR. REICHEL: It will make the warrant valid
12 under the Particularity Clause.

13 JUSTICE STEVENS: Will it also satisfy the
14 text of the Constitution that says no warrant shall
15 issue except upon probable cause? And I'm asking you
16 why is it not adequate probable cause to say we believe
17 that will probably happen when the anticipatory event
18 occurs?

19 MR. REICHEL: Because the text of the -- of
20 the probable cause requirement in the Fourth Amendment
21 has clearly been announced by this Court to always
22 require the magistrate's determination of the facts, as
23 well as the legal grounds, after studied caution to
24 make that determination.

25 JUSTICE STEVENS: Well, he has made a

1 determination of the facts that will establish probable
2 cause.

3 MR. REICHEL: He has, Justice Stevens, but he
4 has ceded his discretion to finalize that -- to
5 finalize that decision.

6 JUSTICE BREYER: Will you -- will you just
7 help me with this? Justice Stevens answered my
8 question. The word anticipatory. The word
9 anticipatory does suggest it isn't valid for a while.
10 Nothing else in the warrant does.

11 What am I supposed to do if I think there's
12 adequate probable cause for issuing that warrant right
13 now in respect to 12 of the things? And it's really
14 pretty hard for me to try to understand what this
15 warrant is about if I'm supposed to understand it, by
16 reading through about 15 or 20 pages of small print and
17 there discovering somewhere in the back of it some --
18 the post office says I'm not going to execute this
19 until this other package gets there too. Now, that
20 does make me nervous. That -- that supports you.

21 MR. REICHEL: That does not --

22 JUSTICE BREYER: I understand that, but it's
23 not going to support you enough unless you connect this
24 anxiety I'm having now about this being buried in page
25 28 of an affidavit when it's an important condition of

1 the warrant, the only clue to that fact being the word
2 anticipatory. And there we are. Now, you tell me why
3 this anxiety, which is going to help you, is connected
4 to something in the law.

5 MR. REICHEL: Justice Breyer, they are prone
6 to abuse by nature. They are --

7 JUSTICE BREYER: No, please don't. I start
8 with an assumption that an anticipatory warrant is
9 constitutionally valid. I start with that assumption.
10 I'm assuming that the conditions have to reasonably
11 describe. My anxiety is resting only on the fact that
12 this warrant doesn't seem to be an anticipatory warrant
13 but for one word, and to know what it's about, you have
14 to look through 28 pages of fine print. Now, you
15 connect that anxiety to something in the law.

16 MR. REICHEL: Thank you, Justice Breyer.

17 In *Groh v. Ramirez*, this Court set forth very
18 clearly that the purpose of the particularity
19 requirement serves two functions. One is for law
20 enforcement; the second is for the homeowner. And for
21 law enforcement, it is very clear in these -- this
22 Court's decisions that that must be so that the officer
23 executing it can simply and quickly and efficiently
24 determine the limits of their power to search.

25 JUSTICE SCALIA: Of course, all -- this whole

1 argument begs the question. It -- it assumes that the
2 particularity requirement includes time, not only who,
3 what, where, but also when. Right? I mean, you -- you
4 acknowledge that if you're wrong about that, if you're
5 wrong about the fact that who, what, and where
6 automatically includes when, the argument you've just
7 made doesn't get anywhere.

8 MR. REICHEL: Justice Scalia, I -- I can --
9 it is inherent in the place, the objects, and the
10 persons to be searched in a particularity --

11 JUSTICE SCALIA: I understand that's your
12 argument, but you agree that if -- if that argument is
13 wrong, you're done.

14 MR. REICHEL: That's correct. With regard to
15 anticipatory warrants, time is part of the
16 particularity requirement. The time of the execution
17 of the warrant, the time of the determination of
18 probable cause that contraband will be present, the
19 time of the determination of probable cause, which is
20 the triggering event, which comes from the Fourth
21 Amendment itself --

22 JUSTICE GINSBURG: They have first the outer
23 limit of the 10 days in the warrant itself. And in
24 fact, this warrant was executed within 2 days of its
25 issuance. Is that not --

1 MR. REICHEL: That's correct, Justice
2 Ginsburg.

3 JUSTICE GINSBURG: And could it be if the
4 officer knows that this package -- let's say it's
5 loaded with dynamite or guns or drugs -- is going to be
6 delivered at a certain time and it -- the delivery
7 occurs, and then the officer busts in and says, there's
8 exigent circumstances. They're going to take those
9 drugs and they'll be off the premises. That might
10 happen.

11 MR. REICHEL: That might happen. Exigent
12 circumstances in the execution of a warrant were not
13 presented in this case.

14 JUSTICE GINSBURG: Well, my -- my question
15 is, isn't it better to have the police go to the
16 magistrate when there's time for the magistrate to
17 reflect, than to have this scenario where the police
18 will say this was really dangerous stuff, exigent
19 circumstances? Wouldn't you want the officer to apply
20 in advance for the warrant?

21 MR. REICHEL: Justice -- Justice Ginsburg,
22 yes, I would. And I think at that point the officers
23 would also have to leave the final determination as to
24 whether probable cause has been completed to the
25 magistrate through the use of many alternatives,

1 including a telephonic warrant where the --

2 JUSTICE GINSBURG: Even -- wasn't this man --
3 magistrate told we've set this whole thing up? We've
4 put this package in the mail. It's going to be
5 delivered at such and such a time. Wasn't the
6 magistrate told that?

7 MR. REICHEL: Yes, Justice Ginsburg.

8 JUSTICE GINSBURG: So why was there a need
9 for a second call when exactly that happened?

10 MR. REICHEL: Well, specifically what was
11 highlighted in this case is that the individual
12 receiving the package was his wife, Justice Ginsburg.
13 And it's -- it's clear in the record that she received
14 it. Moments later, they rushed in. The first thing
15 she said to the officers is what is going on here and
16 why are you here? What is going on here? Why are you
17 here? At that point, I believe clearly under -- under
18 the court of appeals decisions and other court
19 decisions, that this crime, the knowing receipt of the
20 illegal material, had not been completed. There had
21 been no crime committed at that point. And there was
22 no -- no knowing receipt of the illegality of this.
23 There's never been any evidence --
24 JUSTICE GINSBURG: Didn't -- was -- he was on
25 the premises?

1 MR. REICHEL: He was inside the --

2 JUSTICE GINSBURG: And he said, I know why
3 they're here.

4 MR. REICHEL: Justice Ginsburg, he was inside
5 the house, and he walked outside thereafter.

6 JUSTICE SCALIA: Well, and they -- and they
7 found other -- other videotapes besides the one that
8 had just been delivered, didn't they, in the course of
9 the search?

10 MR. REICHEL: They did, Justice Scalia.

11 Now, but they did enter the house prior --
12 they entered the house prior to a lawful triggering
13 condition. In such an example, they could have
14 contacted the magistrate immediately, advised what had
15 happened, who would have realized at that point that a
16 crime had not been committed, that there was not
17 probable cause that this crime, the knowing receipt,
18 had been committed.

19 JUSTICE SOUTER: And exactly the same thing
20 would be true if they had stated the triggering event
21 clearly somewhere in -- in the warrant. The -- the
22 argument here is that the triggering event was stated
23 in the affidavit.

24 MR. REICHEL: But this does -- Justice
25 Souter, this highlights why the triggering event must

1 be clearly, specifically drawn by a magistrate with
2 studied caution about the exact factors for probable
3 cause which would allow this search. And if it's
4 buried in some affidavit somewhere, if it's not on the
5 front of the warrant, or if it's vested in the
6 discretion of the officer to make that determination
7 whether that's close enough, then it is prone to these
8 abuses and it is -- requires the magistrate to make
9 that final legal determination.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. REICHEL: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Dreeben, you have
13 3 minutes remaining.

14 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

15 ON BEHALF OF THE PETITIONER

16 JUSTICE SCALIA: Mr. Dreeben, a quick yes or
17 no. Does the Government concede that when you have an
18 anticipatory warrant, the warrant is not properly
19 executed until the -- the anticipated event occurs?

20 MR. DREEBEN: Yes, Justice Scalia, because
21 the representations that are made to the magistrate to
22 secure the warrant include the fact that the warrant
23 will not be executed and the agents should --

24 JUSTICE STEVENS: But that -- that puzzles me
25 a little. The -- the affidavit says execution will not

1 take place until the event. But the authority to
2 search, which is in the last paragraph, is not limited
3 to the time after the anticipatory event.

4 MR. DREEBEN: That's true because I think
5 that the magistrate is making the common sense judgment
6 that this will be -- we don't know exactly when --

7 JUSTICE STEVENS: I mean, not even -- it is
8 not only the warrant, but the affidavit itself doesn't
9 say we merely request permission to search after the --
10 after the event. It's a general request for authority
11 to search.

12 MR. DREEBEN: It makes the representation,
13 and I think what draws the link between the conditions
14 that are represented to occur before the warrant will
15 be executed and the warrant itself are paragraphs 1, 2,
16 and 3 of the items that are to be seized because those
17 pertain --

18 JUSTICE STEVENS: No. I'm drawing your
19 attention to paragraphs 61 and 64 of the affidavit.

20 MR. DREEBEN: I understand that, Justice
21 Stevens. But the -- the items to be seized include the
22 videotape and its containers which are paragraphs 1, 2,
23 and 3.

24 JUSTICE STEVENS: Yes, but the authority is
25 broader than the authority to search for those items.

1 MR. DREEBEN: That's true. But those items
2 -- the magistrate can conclude that there's probable
3 cause to believe that they'll be on the premises only
4 after delivery has taken place. And the magistrate has
5 issued the warrant, and the three principal items at
6 the top are those things. So it's logical to conclude
7 that the magistrate formed the view that there's
8 probable cause to believe that these items will be on
9 the --

10 JUSTICE STEVENS: But it takes a step of
11 reasoning beyond merely saying we incorporate the --
12 the affidavit into the warrant.

13 MR. DREEBEN: I think it takes a very small
14 step of logical inference, but I agree with you,
15 Justice Stevens, that it doesn't say everything that is
16 logically implied in the magistrate's probable cause
17 finding. But the magistrate's probable cause finding
18 is predicated on the view that the items will be there
19 because the Postal Service has represented they'll
20 deliver them.

21 The burden of the Ninth Circuit's view is
22 that the Particularity Clause applies to the triggering
23 condition and mandates that it be stated in the text
24 even though the Fourth Amendment's text doesn't contain
25 that requirement. This Court in *Dalia v. United States*

1 rejected a similar effort to add a requirement to a
2 warrant that would authorize surreptitious entry to
3 install a covert bugging device, and the Court's
4 reasoning in Dalia makes clear that the Court was
5 unwilling to go on a progressive path of reading things
6 into the Fourth Amendment's Particularity Clause that
7 are not there.

8 JUSTICE BREYER: So you just want us to say,
9 look, the Ninth Circuit is wrong. They're okay to have
10 conditional warrants like this and there is no absolute
11 rule you always have to have the triggering condition
12 in. As to whether this is too confusing or not too
13 confusing, send them back and let them figure it out.

14 MR. DREEBEN: No, I don't want the Court to
15 send it back to the Ninth Circuit to impose yet new
16 requirements on the execution of warrants.

17 (Laughter.)

18 MR. DREEBEN: What I want the Court to hold
19 is that the triggering condition in an anticipatory
20 warrant is not subsumed in the Particularity Clause and
21 therefore it need not be in the face of the warrant at
22 all. And alternatively, if the Court believed that it
23 did, that a warrant that's executed after the
24 triggering condition has occurred, does not require
25 suppression of evidence.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.

3 Dreeben.

4 The case is submitted.

5 (Whereupon, at 11:15 a.m., the case in the
6 above-entitled matter was submitted.)

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