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Anticipatory Search Warrants

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Predicting the Future

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March is one of my favorite months of the year.¹ You've got that whole saying about "coming in like a lion and going out like a lamb." You've got a day that is supposed to be unlucky² and right after that a day that celebrates a guy who drove all of the snakes out of Ireland.³ But the best thing about March is something called the National Collegiate Athletic Association's Men's Division 1 Basketball Tournament or as it is more commonly known, "March Madness."

One of the reasons why the tournament draws so much interest around the country is the timeless tradition called "filling out your bracket." People from all walks of life, including those who know very little about college basketball,⁴ try to predict how the entire tournament will play out before the first game tips off.⁵ Unfortunately for those of us who complete a bracket,⁶ it is very difficult to predict the future and most of us realize the futility of doing so by the end of the first weekend.

There are times when law enforcement can successfully predict the future and even obtain a search warrant based on something that hasn't happened yet. This kind of search warrant is called an "Anticipatory Search Warrant" and is used when police have probable cause to believe that a "triggering event" will occur in the near future that will give rise to probable cause of the presence of contraband or evidence in a particular location. The police will have probable cause usually because they are the ones who are going to cause the "triggering event" to occur.

This type of warrant was upheld by the U.S. Supreme Court in U.S. v. Grubbs.⁷ In Grubbs, the defendant purchased a child pornography videotape from an online web site. What the defendant did not know at the time was that this web site belonged to a business that had been taken over by federal postal inspectors who were using it to find and charge those people who were purchasing this illegal material. Officers with the Postal Inspection Service arranged a controlled delivery of the package to Grubbs' address and applied beforehand for a search warrant. In the affidavit, they stated: "Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence. . . . At that time, and not before, this search warrant will be executed . . ." The warrant was then issued by a Magistrate Judge.

¹ If it's not my favorite, it's definitely in the top 11. October is terrible mainly because it includes Halloween.

² "Beware the Ides of March!" March 15th (the Ides of March on the Roman calendar) was a date for settling debts, which Brutus and Cassius did in a sense when they assassinated Julius Caesar on that date in 44 BC.

³ Now that's what I call a saint! In researching this legal update, I learned that Ireland really doesn't have any snakes and apparently never has. In fact, the only reptile they have is one species of lizard. Many of you are probably considering retiring to Ireland after learning that.

⁴ You know who you are.

⁵ Or technically before the fifth game of the tournament. There are four "play-in" games earlier in the week that most people don't care about.

⁶ Anytime I mention brackets or bracket pools in this article, I am referring only to those which involve no money or other "thing of value" being wagered. I am not advocating violating any gambling laws. In related news, it is estimated that 47 million Americans will bet near \$8.5 billion on the NCAA Tournament this year.

⁷ 547 U.S. 90 (2006).

When an undercover postal inspector delivered the package, Grubbs' wife signed for it and took the unopened package inside. A few minutes later, officers detained Mr. Grubbs as he left the house and then executed the search warrant. Various items were seized, including the videotape, and Grubbs admitted to purchasing the video. He was placed under arrest and later convicted.

In determining that an anticipatory search warrant was allowable under the Fourth Amendment, the Court pointed out that all search warrants are anticipatory in a sense because they are all based on whether probable cause exists to believe there will be evidence of crime found in a particular place when the warrant is executed. An even clearer example of this was a wiretap warrant, which was based on the probability that "crime-related conversations" would ensue after the wiretap was in place.

For this reason, the Court stated, anticipatory search warrants were no different than ordinary warrants. For all search warrants, the issuing judicial official must find that it is probable that contraband/evidence (or a fugitive) will be on the described premises when the warrant is executed. However, since the anticipatory search warrant places a condition other than simply the passage of time on its execution, the Court held that not only must there be probable cause that contraband will be found on the premises after the triggering event, but there must also be probable cause that the triggering event will occur. In Grubbs' case, it was possible that he might refuse delivery of the package but not likely, so probable cause existed as to both and his conviction was upheld.

PRACTICE TIPS

1. When writing the affidavit for an anticipatory search warrant, avoid writing it as though the events have already happened. For example, don't state that "on March 21, the package was delivered" if you are presenting the warrant on March 20th. It needs to be clear the search warrant is an anticipatory one. Here's some language you can modify and use as an example: *"I request that a search warrant for the premises described above be issued with its execution contingent on the following procedures having occurred: On March 21st, 2019, an officer with the Mayberry Police Department will pose as a postal employee and will deliver the package described above containing an illegal controlled substance. After the package is delivered to the above-described premises and is taken inside, this search warrant will be executed."*
2. When filling out your bracket, remember that although the University of Maryland – Baltimore County (UMBC) beat the University of Virginia last year,⁸ a 16 seed has only beaten a 1 seed once in 136 chances. So picking the 1 seed to win their first game is still a pretty good bet.
3. What if you are delivering a package armed with an anticipatory search warrant and no one answers the door? I believe the package needs to go into house before the search warrant may be executed, but there is nothing wrong with leaving the package on the porch and waiting to see what happens. If someone comes to the door and takes the package inside, you can proceed with executing the warrant as planned.
4. A number 11 seed has reached the "Sweet Sixteen" each of last five seasons. Remember Loyola-Chicago and Sister Jean last year? The trick is picking the right one. Can you name all seven of the 11 seeds that have made the round of 16 since 2014?⁹ If you can, I don't want to be in your bracket pool.
5. When intercepting a package and then coordinating the delivery, there is no rule that says that you have to deliver ALL of the drugs that the package contains. It is probably safer to remove most of the drugs first in case something goes wrong with the delivery. Just make it clear in your search warrant that this is being

⁸ I watched this game live last year and still don't really understand how it happened. If this game had been part of a movie script, critics would have dismissed it as way too unrealistic. Do I pick Virginia to go far this year under the theory that "it surely can't happen again" or is there so much pressure on them to get out of the first weekend that they are prone to be upset?

⁹ Syracuse, Loyola-Chicago in 2018, Xavier in 2017, Gonzaga in 2016, UCLA in 2015, Dayton and Tennessee in 2014.

done. And don't remove all of the drugs because then you have taken away the probable cause that there will be evidence in the house when the package is delivered.

6. And a final bracket tip: a team seeded 7 or higher has made the Final Four in each of last six seasons.¹⁰ Armed with all of this information, you should know that you will still probably perform about the same or even better if you forget it all and just pick the teams with the best uniforms or your favorite mascots or something else ridiculous. Don't say I didn't warn you.

Enjoy the Madness!¹¹

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ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith Rodgers, PLLC but he thinks they're pretty cool guys.



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¹⁰ 2013: Wichita St. (9); 2014: UConn (7) and Kentucky (8); 2015: Mich. St. (7); 2016: Syracuse (10); 2017: South Carolina (7); 2018: Loyola-Chicago (11).

¹¹ And go Heels!