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### Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law. I would like to thank Professor Daniel Richman for his invaluable insight and direction throughout the Note-writing process. A special thanks to my wife, Danielle, and to my friends and family for their support and patience.

# TO ATTACH OR NOT TO ATTACH: THE CONTINUED CONFUSION REGARDING SEARCH WARRANTS AND THE INCORPORATION OF SUPPORTING DOCUMENTS

*Michael Longyear\**

*The Fourth Amendment mandates that a search warrant particularly describe what is to be searched or seized. Courts have allowed officers to use supporting documentation, such as affidavits and other attachments, to define, but not expand, the limits of a search. However, the use of these supporting documents creates a problem when the document is referenced in the warrant but is not physically attached to the warrant. This Note argues that the protection of the Fourth Amendment is not the warrant itself, but the guarantee that a warrant, fully detailing the search to be undertaken, has been approved by a neutral magistrate.*

## INTRODUCTION

In 2002, federal authorities uncovered the activities of William Hurwitz, a doctor in northern Virginia who was prescribing high doses of opioids to several of his patients.<sup>1</sup> With help from cooperating witnesses—patients who were arrested for dealing drugs prescribed by Hurwitz—the government was able to obtain voice recordings of Hurwitz acknowledging the fact that it was highly likely that his patients were dealing some of the drugs in order to pay for the rest.<sup>2</sup>

With this evidence, the government prepared a warrant application that included the sworn affidavit of Special Agent Fulton S. Lucas of the Drug Enforcement Administration. The affidavit included information obtained throughout the course of the investigation, including “evidence obtained with the assistance of five of Hurwitz’s patients.”<sup>3</sup> Lucas also submitted the standard federal warrant application form, which required a description of the person or property to be seized. In that section, Lucas wrote, “See Attachment A of Affidavit,” referring to his sworn affidavit discussing the

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1. *United States v. Hurwitz*, 459 F.3d 463, 466–67 (4th Cir. 2006).

2. *Id.* at 467.

3. *Id.* at 469.

evidence the government sought permission to seize.<sup>4</sup> The magistrate granted the warrant application and also granted the government's motion to seal the application and supporting affidavit finding that "revealing the material sought to be sealed would jeopardize an ongoing criminal investigation . . . ."<sup>5</sup>

The government executed the search warrant, entered Hurwitz's medical office, and seized all of his patient files.<sup>6</sup> When Hurwitz was handed the warrant at the completion of the search, there was no list of what was to be seized, since this description was included in an affidavit that was under seal.<sup>7</sup> Only after the agents departed the premises with the patient files did the government attach the application to the warrant and file it with the court. Only then could Hurwitz examine the warrant and its supporting documents to determine whether it was supported by probable cause and not overly broad. Hurwitz was subjected to a search pursuant to a warrant that did not list who was to be searched, what places were to be searched, and which items were to be seized. So far as he could tell, the officers had free reign to search whatever they wanted.

The above scenario highlights yet another nuanced problem in the long history of the Fourth Amendment and more specifically the warrant requirement. The Fourth Amendment mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>8</sup> The Fourth Amendment was originally designed to ban only the use of general warrants, and the remedy available to anyone who was harmed as the result of a general warrant was the opportunity to sue for the common law tort of trespass.<sup>9</sup> However, as Fourth Amendment jurisprudence has evolved, the Fourth Amendment is now read not only to ban general warrants, but also to characterize searches without warrants as presumptively unreasonable and to exclude evidence obtained in violation of the Fourth Amendment.<sup>10</sup>

As a result of this evolving jurisprudence, law enforcement has had to strike a balance between respecting the Fourth Amendment rights of those searched without forfeiting the necessary tools needed to conduct thorough investigations. In helping to strike this balance, courts have recognized the use of supporting documents—warrant applications or sworn affidavits—to define, but not expand, the scope of the search warrant.<sup>11</sup> This development, however, has resulted in many different standards, depending on the jurisdiction, for determining whether or not the supporting

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4. *Id.* This evidence included patient medical and billing files. The affidavit did not identify any individual patient files. *Id.*

5. *Id.* at 469 n.3 (internal quotation marks omitted).

6. *Id.* at 469.

7. *Id.* at 469–70.

8. U.S. Const. amend. IV.

9. See *infra* Part I.A.2.

10. See *infra* Part I.B.2.

11. See *infra* Part I.C.

documents should be read together with the search warrant.<sup>12</sup> The spectrum ranges from a strict requirement calling for both language of incorporation on the face of the warrant and physical attachment of the supporting document to the actual warrant, to a lenient standard requiring only language of incorporation on the face of the warrant.<sup>13</sup>

This seemingly minor technical issue, though, could result in the scenario discussed above—law enforcement conducting a search with the description of the contents sought to be seized under court seal, thereby depriving the searchee of his constitutional right to have the warrant particularly describe the things to be seized at the time of the seizure. Why is this issue so important? Could not a person just wait until after the search, go to the court house, and discover what was to be taken? These questions point to the very distinction that is made in the various circuit court decisions.<sup>14</sup> Some courts take the position that the searchee has the constitutional right—pursuant to the particularity requirement in the Fourth Amendment—to see a list of what is to be seized.<sup>15</sup> Other courts take the position that a person’s constitutional rights are protected by the neutral magistrate who reviews and approves the search warrant.<sup>16</sup> Either way, this is not just another chapter in the long history of Fourth Amendment jurisprudence; rather, this issue highlights the very reason the Fourth Amendment was adopted—the guarantee against general warrants and the limitation on an officer’s ability to rifle through one’s belongings.<sup>17</sup>

The U.S. Supreme Court recognized the many different standards regarding this issue in its 2004 *Groh v. Ramirez*<sup>18</sup> decision. However, the Court abstained from requiring a definitive test to analyze the issue, and as a result, this issue remains unsettled in the circuit courts and is subject to different standards depending on how the various judges reconcile the use of supporting documents to complement a search warrant with their own Fourth Amendment jurisprudence.

This Note examines the use of supporting documents with search warrants in light of both the original intent of the Fourth Amendment and the evolving standards that now accompany Fourth Amendment analysis. Part I traces the history of the Fourth Amendment—its drafting, its evolution into what it is today, and how the various circuit courts have analyzed the supporting documents issue.

Part II analyzes the continuing conflict among the various circuits even after the Supreme Court’s ruling in *Groh*. Part II.A discusses those circuits that have aligned themselves with the Supreme Court’s preference, while Part II.B analyzes those circuits that have narrowly interpreted the Supreme

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12. See *infra* Part I.D.

13. See *infra* Part I.D.1.a.

14. See *infra* Part I.D.1.

15. See *infra* notes 194–97 and accompanying text.

16. See *infra* Part II.B.

17. See *infra* Part I.A.

18. 540 U.S. 551 (2004).

Court's decision and continue to take a pro-law enforcement/original intent approach to the issue. Part III explains why courts should not require yet another bright-line test, but rather should remain faithful to the original intent of the Fourth Amendment and recognize the validity of the warrant—even with supporting documents that do not accompany the warrant—so long as a neutral magistrate has reviewed all of the documents.

#### I. THE HISTORY OF THE FOURTH AMENDMENT: THE WARRANT REQUIREMENT IN THEORY AND IN PRACTICE

This part outlines the history and development of Fourth Amendment jurisprudence from the colonial experience to present day and how this development has impacted the issue of supporting documents and the search warrant. Part I.A explores the use of writs of assistance in colonial America and how this practice inspired the framers to prohibit the use of general warrants in the drafting of the Fourth Amendment. Part I.B traces the development of the Fourth Amendment from a ban on general warrants to (1) a prohibition of unreasonable searches, and (2) a means to exclude illegally obtained evidence with the use of the judicially created exclusionary rule. Part I.C briefly discusses the procedure for obtaining a search warrant as well as the procedure for sealing accompanying documents. Part I.D outlines the varying standards required by the U.S. courts of appeals. Finally, Part I.E discusses the Supreme Court's decision in *Groh v. Ramirez*.

##### A. *The Impact of Writs of Assistance and the Drafting of the Fourth Amendment*

This section summarizes some of the seminal cases that set the stage for the drafting of the Fourth Amendment. Part I.A.1 looks at the use of general warrants in colonial America and analyzes the cases that triggered the intense outrage of the colonists against the use of general warrants. Part I.A.2 traces the drafting of the Fourth Amendment, including the different forms the amendment took, with arguments for and against those versions, the influences behind the drafts, and finally how the amendment ultimately received approval.

#### 1. The Writs of Assistance Cases

The Fourth Amendment to the U.S. Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>19</sup>

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19. U.S. Const. amend. IV.

The framers of the Constitution, as well as many colonists at the time, feared the use of general warrants and “believed that the only threat to the right to be secure came from the possibility that too-loose warrants might be used.”<sup>20</sup>

The fear of general warrants was spawned by the use of writs of assistance by the Crown in colonial America.<sup>21</sup> In his book, *The History and Development of the Fourth Amendment to the United States Constitution*, Nelson B. Lasson outlined extensively the use of the writs and how this in turn led to the warrant requirement in the Fourth Amendment. In colonial times, the writs authorized officers of the Crown to “search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye.”<sup>22</sup> Upon the death of King George II, the writs expired, and before new writs were issued, their validity was challenged.<sup>23</sup> In what came to be known as the *Writs of Assistance Case*, James Otis, former advocate general of the admiralty court, argued that the “Writ [was] against the fundamental Principles of Law. — The Privilege of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle . . . .”<sup>24</sup> Despite his passionate argument—an argument that would later help frame the Fourth Amendment—the court upheld the legality of the writ.<sup>25</sup>

Two important cases followed the *Writs of Assistance Case*: *Wilkes v. Wood*<sup>26</sup> and *Entick v. Carrington*.<sup>27</sup> In *Wilkes*, the secretary of state, Lord Halifax, issued a general warrant that ordered the arrest of Wilkes, a pamphleteer who criticized the king’s ministers and the seizure of his books and papers.<sup>28</sup> Wilkes successfully sued in a tort action and received a

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20. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 552 (1999).

21. *Id.* at 561.

22. Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (1937). Unlike other general warrants at the time, the writs of assistance were a “continuous license and authority during the whole lifetime of the reigning sovereign. The discretion delegated to the official was therefore practically absolute and unlimited.” *Id.*

23. M.H. Smith, *The Writs of Assistance Case* 144 (1978).

24. *Id.* at 317. Otis was asked to argue the case for the Crown, but instead renounced his post and argued against the use of the writs. *Id.* at 316.

25. Davies, *supra* note 20, at 561.

26. (1763) 98 Eng. Rep. 489 (C.P.).

27. (1765) 95 Eng. Rep. 807 (C.P.).

28. William J. Stuntz, *Warrant Clause*, in *The Heritage Guide to the Constitution* 326, 327 (Edwin Meese et al. eds., 2005). John Wilkes was a member of Parliament who published pamphlets called *The North Briton*. These pamphlets criticized both ministers of the government as well as government policies. One pamphlet in particular, No. 45, contained a bitter attack upon the king’s speech. The government sought to apprehend the responsible parties and issued a general warrant which ordered the officials “to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, *The North Briton*, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.” Lasson, *supra* note 22, at 43 (quoting the Lord Halifax warrant).

judgment of £5000.<sup>29</sup> *Entick* was similar to *Wilkes* in that a warrant was issued commanding the seizure of Entick and all of his papers due to his critical view of the king.<sup>30</sup> Like Wilkes, Entick sued the messengers who carried out the general warrant. Entick was awarded £300 in his tort action for trespass.<sup>31</sup>

These cases, commonly referred to as the *Wilkesite Cases*, stirred great outcry among the colonists against the use of general warrants.<sup>32</sup> Several news reports seized on the general warrant issue, referring to it as “a Cause, that, in the highest degree, affected the most sacred and inviolate Rights and Liberties of Englishmen.”<sup>33</sup> In probably one of the most commonly cited speeches at the time, Lord Camden declared in *Entick* that “[general] warrants . . . [were] illegal, oppressive, and unwarrantable,”<sup>34</sup> and that “Englishmens houses may be now again considered as their castles, and not so liable to be exposed to the wanton sport or resentment of the iron hand of arbitrary power.”<sup>35</sup> This overwhelming sentiment against the use of general warrants was shared by James Madison, who would later draft the Fourth Amendment.

## 2. Drafting of the Fourth Amendment

The above cases were clearly in the minds of the framers when they drafted the Fourth Amendment.<sup>36</sup> The Fourth Amendment went through several drafts before being adopted with the language as we know it.<sup>37</sup> Most of the disagreement among the drafters had to do with the warrant clause. As Lasson noted,

[T]he Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal

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29. Stuntz, *supra* note 28, at 327.

30. *Id.*

31. Phillip A. Hubbart, *Making Sense of Search and Seizure Law: A Fourth Amendment Handbook* 45 (2005).

32. In fact, “Wilkes and Liberty” became a rallying cry of colonists. Lasson, *supra* note 22, at 45–46. The colonists embraced Wilkes as a hero who was on the forefront in the fight against the use of general warrants. Hubbart, *supra* note 31, at 46 n.114. American supporters of Wilkes’s cause sent him various gifts and letters of encouragement while he served his twenty-two-month prison term. *Id.* at 47.

33. Davies, *supra* note 20, at 563 n.22 (quoting a contemporary news report).

34. *Id.* at 563

35. *Id.* at 564 n.22 (quoting a contemporary news report).

36. *See generally* Declaration and Resolves of the First Continental Congress (Oct. 4, 1774), available at <http://www.yale.edu/lawweb/avalon/resolves.htm>. “That the following acts of parliament are infringements and violations of the rights of the colonists; . . . The several acts of Geo. III . . . authorize the judges certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized, before he shall be allowed to defend his property, and are subversive of American rights.” *Id.*

37. Lasson, *supra* note 22, at 101. “[T]he House actually voted down a motion to make it read as it does now.” *Id.*



Government limited consequently to the issuance of warrants without probable cause, etc.<sup>38</sup>

Lasson concluded that the first clause of the Fourth Amendment gave a broad reasonableness standard and that the second clause banned general warrants.<sup>39</sup> Consequently, the adoption of this amendment secured the aim of the framers: “ensuring the protection of person and house by prohibiting legislative approval of general warrants.”<sup>40</sup>

Madison’s first draft of the amendment was a single clause that read:

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>41</sup>

This single-clause format had the effect of simply banning general warrants. Upon review by the House “Committee of Eleven,” Madison’s one-clause submission was all but unchanged—the committee substituted “effects” for “other property”<sup>42</sup> and removed “all” from “all unreasonable searches.”<sup>43</sup> After committee, some objections were made, notably by Elbridge Gerry of Massachusetts, who objected to the phrase “by warrants issuing” and instead wanted the phrase to read “and no warrants shall issue.”<sup>44</sup> This objection was made in order to make the language “sufficiently imperative.”<sup>45</sup> As Thomas Davies concluded, “The final two-clause format . . . and the fact that the resulting first clause ended by stating that the right ‘shall not be violated,’ are mere by-products of a change that was only intended to make the ban against *issuance* of general warrants explicit.”<sup>46</sup>

In sum, the framers authored the Fourth Amendment as a direct response to the abuses suffered by general warrants issued by the Crown. Davies noted, “The Framers aimed the Fourth Amendment precisely at banning Congress from authorizing use of general warrants . . . [and] did not mean

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38. *Id.* at 103.

39. Davies, *supra* note 20, at 568.

40. *Id.* at 590.

41. *Id.* at 697 (quoting James Madison, Amendments to the Constitution, in 12 The Papers of James Madison 201 (Charles F. Hobson et al. eds., 1979)).

42. *Id.* at 710.

43. *Id.* at 715. “Thus, the Committee members must have also understood the proposed search and seizure language as a ban solely against legislative approval of general warrants.” *Id.* at 716.

44. *Id.* at 717–18. Scholars debate about whether the objection should be attributed to Elbridge Gerry or to Egbert Benson. Nelson Lasson attributes the objection to Benson, and the Congressional record cites Benson as the objector; however, most of the evidence suggests that Gerry made the objection since Benson served on the Committee of Eleven and would have most likely made the change while the draft was being reviewed by the Committee. *Id.*

45. *Id.* at 720. Elbridge Gerry was from Massachusetts, the state where most of the writs of assistance harms were committed.

46. *Id.* at 722.

to create any broad reasonableness standard for assessing warrantless searches and arrests.”<sup>47</sup> Despite this intention to restrict the Fourth Amendment to solely a ban on general warrants, the Supreme Court would begin to read the amendment as a prohibition on both general warrants and unreasonable searches.<sup>48</sup>

### B. *Evolution of Fourth Amendment Jurisprudence*

This section analyzes the shift in the way the courts analyzed search and seizure cases. Part I.B.1 looks at the incorporation of a reasonableness standard in evaluating both searches conducted with a search warrant as well as those conducted without a search warrant. As will be discussed later, this change in the reading of the Fourth Amendment will affect the analysis that courts will make in deciding whether or not having supporting documents incorporated in a search warrant is reasonable.<sup>49</sup> Part I.B.2 looks at the introduction and evolution of the exclusionary rule into Fourth Amendment analysis, especially with regard to warrants and the good faith exceptions to the exclusionary rule.

#### 1. From Banning General Warrants to Focusing on Reasonableness

Several Supreme Court decisions from the late nineteenth century to the present have transformed the Fourth Amendment from the simple ban on general warrants that it was at its adoption to its current form, which covers warrants, warrantless exceptions, and reasonable and unreasonable searches.

In *Boyd v. United States*,<sup>50</sup> Justice Joseph Bradley, through examination of previous decisions and historical records, tried to determine “what was meant by unreasonable searches and seizures.”<sup>51</sup> This case was one of the

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47. *Id.* at 724. “The silences of the text regarding warrantless intrusions and when warrants were required or excused were not oversights or defects of drafting. Rather, in the common-law context the Framers had no reason to expect that those topics could become unsettled or controversial.” *Id.* The Fourth Amendment, then, created a right espoused by Charles Pratt Camden and James Otis in the *Wilkesite Cases*—a protection against general warrants—and if this right was violated, the claimants would have a remedy in law of torts for trespass. Hubbart, *supra* note 31, at 78–81.

48. Although pure general warrant cases are rare these days, a recent decision in the U.S. Court of Appeals for the Ninth Circuit shows that, despite all of the progress that has been made regarding Fourth Amendment protections, general warrants are still an issue. In *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006), the Court was faced with an issue regarding patient files in the Bay Area Laboratory Co-operative (BALCO) drug investigation. Federal agents received a warrant to seize the patient files of ten Major League Baseball players. *Id.* at 921. In performing the search, however, the officers seized the directory, which listed all of BALCO’s patients. *Id.* at 922–23. This raised the question of whether or not this search warrant constituted a general warrant. The Ninth Circuit remanded the case to the district court to determine which files could be kept and which files must be returned to the aggrieved parties. *Id.* at 943.

49. See *infra* notes 121–29 and accompanying text.

50. 116 U.S. 616 (1886).

51. *Id.* at 627.

first cases that attempted to apply the “original intent” of the Fourth Amendment to the then current practice of police investigations. Quoting Lord Camden from *Entick v. Carrington*, Bradley wrote,

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants [police officers] to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.<sup>52</sup>

Bradley acknowledged that the search of one’s home by a police officer was a trespass and was excused only if the officer could prove that he had authority to search the premises; otherwise, the officer had committed a tort. Furthermore, the Court in *Boyd* intertwined the Fourth and Fifth Amendments thereby holding that it was unconstitutional for a person to turn over documents that could be incriminating.<sup>53</sup> Although not a modern approach to the Fourth Amendment, Boyd “opened the way for later court decisions to create modern doctrine . . . .”<sup>54</sup>

*Weeks v. United States*<sup>55</sup> was one such decision, and in some commentators’ minds, it moved the Fourth Amendment from solely a ban on general warrants to a “protection, especially in the home, against discretionary police activity.”<sup>56</sup> In *Weeks*, the defendant was charged with using the mail to distribute lottery tickets.<sup>57</sup> The defendant was arrested without an arrest warrant, and his house was searched and papers were seized without a search warrant.<sup>58</sup> The Court held that,

[i]f letters and private documents can . . . be seized [without a warrant] . . . and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure

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52. *Id.*

53. *See id.* at 637.

54. Davies, *supra* note 20, at 729.

55. 232 U.S. 383 (1914).

56. Robert M. Bloom, *Searches Seizures, and Warrants: A Reference Guide to the United States Constitution* 13 (2003); *see also* Davies, *supra* note 20, at 730–31 (“*Weeks* initiated the development of modern doctrine by reading the Fourth Amendment as a broad protection of a right to be secure in one’s house and papers rather than as a simple ban against general warrants.”).

57. *Weeks*, 232 U.S. at 386.

58. *Id.*

against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.<sup>59</sup>

Not only did the Court in *Weeks* expand the meaning of the Fourth Amendment to include a general protection of citizens from invasions by police officers without warrants, but it also held that the remedy for such “misconduct” was the exclusion of the evidence seized by the officers.<sup>60</sup>

Nearly a decade after *Weeks*, the Court further departed from the original meaning of the Fourth Amendment in *Carroll v. United States*.<sup>61</sup> In *Carroll*, officers conducted a warrantless search of defendants’ automobile and seized alcohol. In this case, the Court announced that “[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.”<sup>62</sup> Since many of the previous cases dealt with searches and seizures occurring in one’s home, Chief Justice William Howard Taft held that the “true rule is that if the search and seizure without a warrant are made upon probable cause . . . reasonably arising out of circumstances known to the seizing officer . . . the search and seizure are valid.”<sup>63</sup> This shift in Fourth Amendment analysis—from a requirement of warrants in all cases announced in *Weeks* to a reliance on the reasonableness of the officer in *Carroll*—would open the door for modern courts (post-Warren Courts) to “favor police power over the security of the citizen.”<sup>64</sup> As Bloom has noted, since *Carroll*, the “Court has continued to articulate its preference for warrants through its words but not by its actual holdings.”<sup>65</sup>

## 2. The Exclusionary Rule and Its Effect on the Warrant Requirement

In early American history, “[c]olonial justice was a business of amateurs.”<sup>66</sup> The local sheriff headed law enforcement, and constables and night watchmen were the equivalent of modern-day police.<sup>67</sup> For the most part, these men were “ordinary citizens.”<sup>68</sup> Therefore, since these were ordinary citizens and the act of searching literally constituted a trespass, the lawful warrant would indemnify the officer from a civil lawsuit for trespassing.<sup>69</sup> Modern police forces did not begin to organize until around

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59. *Id.* at 393. The Court further held that the intent of the Fourth Amendment was to secure persons from unlawful invasions by officials acting under the color of government sanction. *Id.* at 394.

60. *Id.* at 398.

61. 267 U.S. 132 (1925).

62. *Id.* at 147.

63. *Id.* at 149.

64. Davies, *supra* note 20, at 733.

65. Bloom, *supra* note 56, at 13; see *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that searches conducted without sanction by an impartial judge or magistrate are “*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”).

66. Lawrence M. Friedman, *Crime and Punishment in American History* 27 (1993).

67. *Id.* at 28.

68. *Id.*

69. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 779 (1994).

the time of the Civil War.<sup>70</sup> Scholars have argued that this newly organized force, unforeseen by the framers, required even more protections of citizens' liberty rights.<sup>71</sup> As Carol Steiker observed,

The metamorphosis of the colonial constabulary and watch into the recognizable precursors of modern-day law enforcement illustrates the ways in which the invention of the police created new threats to liberty. Our colonial forebears could not have predicted the sheer numbers of law enforcement agents at work today, the breadth of their operational mandate, or their pervasive authoritarian presence. They could not have imagined that the informal structures of constabulary and watch would be transformed into a bureaucracy isolated from and frequently beyond the control of local communities. They had no experience with the kind of institutionalized corruption or shocking brutality that are among the most common complaints about law enforcement today.<sup>72</sup>

As a response to the changing situation, courts read the Fourth Amendment as more than just requiring warrants and reasonable searches; rather, the Fourth Amendment should deter police misconduct. Consequently, courts have taken it upon themselves to respond to the dilemma of police misconduct.<sup>73</sup>

The Fourth Amendment does not call for the suppression of evidence seized contrary to its provisions. As noted above, *Weeks v. United States* was the first case to articulate the exclusionary rule,<sup>74</sup> which has been recognized by subsequent decisions as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”<sup>75</sup> From 1914 to 1961, a series of decisions expanded the exclusionary rule from a mere ban on the actions of federal officers to a deterrent on the actions of local officers.

After *Weeks*, which held that the exclusionary rule applied only to federal officers but that evidence seized by state officers and handed over to federal officials still was admissible,<sup>76</sup> the Supreme Court held in *Wolf v.*

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70. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 833 (1994).

71. *Id.* Steiker argues that police “developed . . . their own . . . culture . . .” *Id.* Police were in charge of both crime investigation and prevention. This newly formed entity, increasing in size, “gave rise to concerns about abuses of that authority: who would police the police?” *Id.* at 834. Administrative and legislative attempts at police reform proved ineffectual. *Id.* at 835.

72. *Id.* at 837.

73. See Stanley C. Brubaker, *The Misunderstood Fourth Amendment: The Originalist Reading Is Better Both for Civil Liberties and for Fighting the War on Terror*, Wkly. Standard, Mar. 6, 2006, at 29. Brubaker argues that the Warren Court’s reading of the Fourth Amendment greatly distorted its original meaning. Instead of allowing the victim to sue in a tort action, the only reprieve for the defendant was the exclusion of the illegally seized evidence. *See id.*

74. See *supra* notes 55–60 and accompanying text.

75. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

76. See *supra* notes 55–60 and accompanying text.

*Colorado*<sup>77</sup> that the Fourth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment; however, since the exclusionary rule was not based in the Constitution, it did not apply to the states.<sup>78</sup> In *Elkins v. United States*,<sup>79</sup> the Court overruled its decision in *Weeks* and held that evidence illegally seized by state officers could not be used in a federal prosecution—thus increasing the reach of the exclusionary rule.<sup>80</sup> Finally, in *Mapp v. Ohio*,<sup>81</sup> the Supreme Court held that evidence seized in violation of the Fourth Amendment could not be admitted in state court.<sup>82</sup>

Despite the Court's active attempt to give sharper teeth to the Fourth Amendment, the Court soon carved out a good faith exception when it came to search warrants. In *United States v. Leon*,<sup>83</sup> faced with the issue of whether or not to exclude evidence that was seized pursuant to a defective warrant, the Court held that,

“[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, [then] evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.”<sup>84</sup>

Therefore, the Court held that when an officer has a good faith belief that the warrant is valid, and this belief is objectively reasonable, the evidence will not be suppressed if it is later found that the warrant was invalid.<sup>85</sup>

The “Court [in *Leon*] . . . identified four situations in which police reliance on a warrant is not objectively reasonable” and, therefore, in which the exclusionary rule should be applied.<sup>86</sup> For the purposes of this Note, the focus will be on the situation “when the warrant was so facially deficient that a reasonable officer could not have believed it to be valid.”<sup>87</sup> As will be discussed below,<sup>88</sup> an officer with a warrant that contains language that

77. 338 U.S. 25 (1949).

78. *Id.* at 28.

79. 364 U.S. 206 (1960).

80. *Id.* at 223–24.

81. 367 U.S. 643 (1961).

82. *Id.* at 655–56.

83. 468 U.S. 897 (1984).

84. *Id.* at 919 (quoting *U.S. v. Peltier*, 422 U.S. 531, 542 (1975)).

85. *Id.* at 920–23.

86. *Article I: Investigation and Police Practices*, 35 *Geo. L.J. Ann. Rev. Crim. Proc.* 3, 191 (2006). The first three situations fall outside the scope of this Note. They are

(1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) when the magistrate failed to act in a neutral and detached manner; [and] (3) when the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable . . . .

*Id.* at 191–93 (internal quotation marks omitted).

87. *Id.* at 193; see *Leon*, 468 U.S. at 923 (“[A] warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.”).

88. See *infra* notes 154–61 and accompanying text.

is overly broad cannot have an objectively reasonable belief that the warrant is facially valid.

### C. The Search Warrant Process

This section outlines the steps that an officer takes to procure a warrant.<sup>89</sup> It also discusses the procedure of sealing documents that support a search warrant, because this practice has a large impact on the incorporation of these documents during the execution of the search warrant, as will be discussed below.<sup>90</sup>

Aside from the “well-delineated exceptions,”<sup>91</sup> in order for a search to be valid, an officer must obtain a valid search warrant. Pursuant to Rule 41(c) of the Federal Rules of Criminal Procedure, once an officer has probable cause, he or she must swear to an affidavit and apply for a search warrant.<sup>92</sup>

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89. While this section uses the Federal Rules of Criminal Procedure as a guideline, it should be recognized that each state has its own rules of criminal procedure. As noted in Wayne LaFave’s treatise on criminal procedure,

Roughly half of the states have court rules of criminal procedure or statutory codes of criminal procedure that borrow heavily from the Federal Rules. Only a handful of these states have fairly complete replications, and even then, they typically fail to pick up an amendment here or there or find need to add a special provision or two dealing with a subject not covered by the Federal Rules. Most of the states in the Federal Rules grouping have a criminal procedure law more loosely modeled on the Federal Rules. They typically start with a set of provisions covering basically the same general subjects as the Federal Rules, utilize the specific standards of the Federal Rules for a majority of those subjects, adopt modifications for a fair number, and then completely depart for a few others. Overall, they incorporate many more basics of the Federal Rules than they reject, and that incorporation encompasses a wide range of procedures, running from the initial filing of the complaint to posttrial motions.

1 Wayne R. LaFave et al., *Criminal Procedure* § 1.2(f), at 50–51 (2d ed. 1999) (citations omitted). In fact, “[t]he federal system is responsible each year for less than 2% of the total number of criminal prosecutions brought in the United States.” *Id.* § 1.2(b), at 10.

The states with court rules modeled upon the Federal Rules of Criminal Procedure are Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. States with statutory codes modeled upon the Federal Rules are Kansas, Montana, and Utah.

Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 *Annals Am. Acad. Pol. & Soc. Sci.* 130, 138 n.18 (1996).

90. See *infra* notes 99–103 and accompanying text.

91. Exceptions include “(1) Investigatory detentions; (2) Search Incident to Valid Arrest; (3) Plain View Doctrine; (4) Exigent Circumstances; (5) Consent Doctrine; (6) Vehicle Searches; (7) Inventory Searches; (8) Border Searches; (9) Searches at Sea; (10) Administrative Searches; (11) Special Needs Searches, like school drug testing; and (12) Abandoned Property.” Laurie L. Levenson, *A Student’s Guide to the Federal Rules of Criminal Procedure* 380 n.15 (2003).

92. The affidavit must contain the following:

(1) the crime alleged to have been committed, (2) any facts demonstrating probable cause that each element of the crime has been committed, (3) the involvement of each person or place to be searched or seized in the commission of the crime, (4) any reasons to believe that evidence of the crime will be located at any place sought to be searched, and (5) the source of the affiant’s information.

The warrant can be issued by both federal magistrate judges and state court judges.

According to Rule 41, to satisfy the particularity requirement, the warrant must identify with specificity the place, person, or item to be searched or seized.<sup>93</sup> When describing the place to be searched, the application should include the address and a description of the location to be searched.<sup>94</sup> A description of the persons to be searched should use the searchee's name or, if not known, then a description of the searchee.<sup>95</sup> The warrant should detail the items to be seized.<sup>96</sup> A warrant may be invalidated if the officer uses overbroad language to specify the items to be seized.<sup>97</sup> Lastly, the court has the authority to seal an affidavit in support of a warrant application if the government satisfies its burden of showing the adverse consequences to persons or an investigation by granting immediate access to the affidavit.<sup>98</sup>

To seal an affidavit, the government must show that sealing the document will protect the ongoing investigation.<sup>99</sup> In *Baltimore Sun Co. v.*

*Id.* at 380–81.

93. *Id.* at 381–82.

94. See *Steele v. United States*, 267 U.S. 498, 503 (1925) (upholding the validity of a warrant so long as the description is specific enough “such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended”).

95. “[T]he individual must be described with such particularity that he may be identified with reasonable certainty. The person’s name will suffice, but a name is not essential if certain other facts, such as location and physical description, are given.” 2 LaFave, *supra* note 89, § 3.4(f), at 134. See *United States v. Ferrone*, 438 F.2d 381, 389 (3d Cir. 1971) (holding “that the physical description of appellant, coupled with the precise location at which he could be found, was sufficient and the John Doe warrant was, therefore, valid”).

96. See *Marron v. United States*, 275 U.S. 192, 196 (1927) (“The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.”).

[T]he requirement of particularity is closely tied to the requirement of probable cause to search, under which it must be probable (i) that the described items are connected with criminal activity, and (ii) that they are to be found in the place searched. The less precise the description of the things to be seized, the more likely it will be that either or both of those probabilities has not been established. 2 LaFave, *supra* note 89, § 3.4(f), at 135.

97. See *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984) (holding that the attachment of an affidavit could cure an otherwise overbroad description of items to be seized in the actual search warrant).

98. See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978) (acknowledging that while citizens have a right to inspect judicial documents, this right is not absolute and can be limited at the discretion of the trial court).

99. See David Horan, *Breaking the Seal on White-Collar Criminal Search Warrant Materials*, 28 Pepp. L. Rev. 317, 325 (2001). Many other reasons have been given by courts to seal affidavits. See *In re EyeCare Physicians of Am.*, 100 F.3d 514, 519 (7th Cir. 1996) (holding that disclosure of the affidavit could affect secrecy of a convened grand jury); *Certain Interested Individuals v. Pulitzer Publ’g Co.*, 895 F.2d 460, 467 (8th Cir. 1990) (holding that search warrant affidavits implicate individuals in criminal conduct and could “seriously damage their reputations and careers”); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (“[T]he affidavit may describe continuing investigations, disclose information gleaned from wiretaps that have not yet been terminated, or reveal the identity of informers whose lives would be endangered.”); *In re Search Warrant for Secretarial Area—Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) (including affidavit contains nature and



*Goetz*,<sup>100</sup> the U.S. Court of Appeals for the Fourth Circuit outlined the procedure to seal an affidavit. The government's "motion to seal all or part of the papers is usually made when the government applies for the warrant," and the decision "to seal the papers must be made by the [magistrate]," who "may explicitly adopt the facts that the government presents to justify sealing when the evidence appears creditable."<sup>101</sup> The magistrate may seal the documents when it is "essential to preserve higher values and is narrowly tailored to serve that interest."<sup>102</sup> After a search has been executed, pursuant to Rule 41(i) of the Federal Rules of Criminal Procedure, the magistrate "must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized." The affidavit then becomes a judicial document whereby the target of the search has a common law right of access to view the document.<sup>103</sup>

*D. The Various Standards of Language of Incorporation  
and Accompaniment of the Affidavit:  
Confusion Among the Circuits Before Groh v. Ramirez*

This section outlines the various approaches taken by the several circuits when faced with the issue of deciding whether or not a search warrant, although facially deficient due to the lack of particularity, is saved by the incorporation of and attachment/accompaniment of supporting documents. Part I.D.1 briefly outlines the several standards imposed by the circuits when analyzing the issue. Part I.D.1.a through Part I.D.1.d take a closer look at how the courts apply these standards to different facts and how differing Fourth Amendment jurisprudence affects the outcome of a case.

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scope of ongoing government investigation and "[t]here is a substantial probability that the government's on-going investigation would be severely compromised if the sealed documents were released"); *In re Four Search Warrants*, 945 F. Supp. 1563, 1568 (N.D. Ga. 1996) ("Release of the names of witnesses in the affidavits will lead to intense media scrutiny that will harass present witnesses and deter future witnesses from coming forward.").

100. 886 F.2d 60 (4th Cir. 1989).

101. *Id.* at 65.

102. *Id.* at 65–66 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). The court noted that the magistrate should also consider alternatives to sealing the entire document, e.g., producing a redacted version or disclosing some of the documents. *Id.* at 66.

103. Fed. R. Crim. P. 41(i); see *Gardner v. Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (holding that, although "the fact that search warrants are commonly filed under seal until the warrant is executed does not change their status as public documents," the decision to unseal is subject to the discretion and careful review of the judge); see generally, Erica A. Kaston, *The Expanding Right of Access: Does It Extend to Search Warrant Affidavits?*, 58 *Fordham L. Rev.* 655 (1990).

### 1. Circuit Splits

While the traditional rule is that an affidavit cannot cure the generality of a search warrant,<sup>104</sup> many state courts and federal courts have held that it is possible for a facially deficient warrant—deficient due to lack of specificity in describing persons or places to be searched—to be saved by a sufficient description in the affidavit.<sup>105</sup> The first court of appeals decision on the issue of curing an invalid search warrant was the U.S. Court of Appeals for the D.C. Circuit's opinion in *Moore v. United States*,<sup>106</sup> where the court held that “the warrant may properly be construed with reference to an affidavit for purposes of sustaining the particularity of the premises to be searched, provided that (1) the affidavit accompanies the warrant, and . . . (2) the warrant uses ‘suitable words of reference’ which incorporate the affidavit by reference.”<sup>107</sup> Since this decision, most of the circuits have ruled on the issue, with different standards prevailing. The Supreme Court has discussed the issue, but has yet to put an end to the debate.<sup>108</sup>

In his treatise on search and seizure law, Wayne R. LaFave has categorized the many different standards that circuits use to cure a facially invalid search warrant with a supporting document.<sup>109</sup> The standards are as follows: (1) only language of incorporation is sufficient, (2) affidavit available to the officers executing the warrant is sufficient,<sup>110</sup> (3) language of incorporation and accompaniment is required, and (4) language of incorporation and physical attachment is required.<sup>111</sup> Although the

104. See *United States v. Gill*, 623 F.2d 540, 543 (8th Cir. 1980) (“The traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant. . . . However, where the affidavit is incorporated into the warrant, it has been held that the warrant may properly be construed with reference to the affidavit for purposes of sustaining the particularity of the premises to be searched. . . .”) (quoting *United States v. Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1978)).

105. See Larry EchoHawk & Paul EchoHawk, *Curing a Search Warrant That Fails to Particularly Describe the Place to Be Searched*, 35 Idaho L. Rev. 1, 13 (1998) (tracing the earliest state court recognition of saving an invalid search warrant with incorporated documents to *Dwinells v. Boynton*, 85 Mass. (3 Allen) 310 (1862)).

106. 461 F.2d 1236 (D.C. Cir. 1972).

107. *Id.* at 1238 (citing *United States v. Snow*, 9 F.2d 978, 979 (D. Mass. 1925)).

108. See *infra* notes 154–66 and accompanying text.

109. Curing a search warrant means that the warrant becomes valid when taken together with the supporting documents. While it still could be possible for a court to uphold the validity of the search pursuant to the good faith exception in *Leon*, the following sections discuss the circumstances in which courts did not have to decide on the good faith exception since it was found that the search warrant was facially valid.

110. This requirement assumes that the officer executing the warrant is the officer who applied for the warrant and therefore covers two other standards: (1) language of incorporation, accompaniment, and the affiant executing the search, and (2) knowledge on the part of the affiant executing the warrant as to what he was authorized to seize. In theory, then, this category is a catchall that involves the affidavit being available at the scene and the officer knowing what is contained in the affidavit when he or she executes the warrant.

111. 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(a), at 613–14 (4th ed. 2004); see also EchoHawk & EchoHawk, *supra* note 105, at 13–22.

standards seem clear enough, as will be discussed below, several circuits have found that their decisions fall into more than one category. One circuit has established a bright-line rule, i.e. the warrant must include express language of incorporation and physical attachment; however, many circuits have resisted this strict standard, and have based their decisions instead on whether or not the warrant and affidavit were used in a way that limited the search so that it complied with the spirit of the Fourth Amendment.

a. *Language of Incorporation*

The most lenient of the standards requires only that the search warrant refer to the supporting documents by some language of incorporation (e.g., “See Attachment A” or “See Exhibit A”).<sup>112</sup> Only a few courts have adopted this lenient standard requiring only language of incorporation to cure a facially deficient search warrant. Acknowledging that language of incorporation and physical attachment would end the inquiry as to the validity of the cure, the U.S. Court of Appeals for the Seventh Circuit in *United States v. Jones*<sup>113</sup> held that incorporation by reference “suppl[ies] . . . the particularity required by the Fourth Amendment.”<sup>114</sup> The court reasoned that requiring incorporation language and physical attachment in every circumstance would produce an “artificial rigidity” in this area and run counter to the purpose of the particularity requirement: protection from general searches as well as recognition of the practical needs of law enforcement.<sup>115</sup> Similarly, the D.C. Circuit found in *United States v. Dale*,<sup>116</sup> a case involving tax fraud, that “the warrant was not constitutionally infirm because it . . . incorporated an affidavit to limit the search . . . .”<sup>117</sup> In *United States v. Washington*,<sup>118</sup> the Fourth Circuit gave a slight variation on this rule when it held that “[a]n affidavit may provide the necessary particularity for a warrant if it is either incorporated into or

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The EchoHawk article divides the various standards differently, labeling them (1) incorporation by reference and physical attachment, (2) incorporation by reference and affidavit accompanies the search warrant, (3) either incorporation by reference or attachment, (4) incorporation and equivalent of accompany, and (5) functional equivalent approach. EchoHawk & EchoHawk, *supra* note 105, at 13–18.

112. For a discussion on suitable language of incorporation, see *United States v. Maxwell*, 920 F.2d 1028, 1032 (D.C. Cir. 1990) (“Although there is little case law specifically addressing what suffices to incorporate an affidavit into a warrant by reference, we believe that something more is required than a boilerplate statement that the affidavit or affidavits presented to the magistrate constitute probable cause for issuing the warrant. . . . [T]he express incorporation rule . . . [requires] the magistrate to manifest an explicit intention to incorporate an affidavit.” (citations omitted)).

113. 54 F.3d 1285 (7th Cir. 1995).

114. *Id.* at 1290.

115. *Id.* at 1291.

116. 991 F.2d 819 (D.C. Cir. 1993).

117. *Id.* at 848. The court also noted the importance of the fact that the warrant was “executed by the affiant pursuant to a specific plan.” *Id.* The court, however, did not find that this aspect was necessary in order to cure the search warrant. *Id.*

118. 852 F.2d 803 (4th Cir. 1988).

attached to the warrant.”<sup>119</sup> It also should be noted that many state courts have referenced circuit court holdings when faced with the incorporation issue.<sup>120</sup>

b. *Availability of the Affidavit*

Other courts have based their decisions on policy grounds—that the spirit of the Fourth Amendment is followed so long as the officers conducting the search know the limits of the search. In *United States v. Bianco*,<sup>121</sup> the U.S. Court of Appeals for the Second Circuit held that

[w]arrants must be read in a ‘commonsense’ fashion, and . . . should not adhere to formal requirements of incorporation and attachment where as here, [where there was no language of incorporation or physical attachment] it is clear that the involved parties were aware of the scope of and limitations on the search.<sup>122</sup>

Much like in *Jones*, the court took a more practical approach and determined that, so long as the officer knew the limits of the search, the Fourth Amendment would not be violated. The court in *Bianco* found that “because of the presence at the search of the affidavit, [the agent’s] active supervision of the search, the specificity of the affidavit, and the fact that the agents did not exceed the scope of the warrant and affidavit when read together, . . . the search was reasonable.”<sup>123</sup>

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119. *Id.* at 805 (quoting *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987)).

120. Although a majority of criminal prosecutions are conducted in state courts, it appears that, for the most part, state courts have deferred to the circuit courts when ruling on the incorporation issue. *See State v. Holland*, 781 S.W.2d 808, 814 (Mo. Ct. App. 1989) (“[S]ufficient particularity to validate a warrant inadequately limited upon its face may be supplied by the attachment or incorporation by reference of the application for the warrant and the supporting affidavits.”); *State v. Kleinberg*, 421 N.W.2d 450, 453–54 (Neb. 1988) (“An affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant. . . . Sufficient particularity may also be provided even if the affidavit is merely present at the search.” (quoting *Rickert*, 813 F.2d at 909)); *State v. Jost*, 858 P.2d 881, 884 (Or. Ct. App. 1993) (“The warrant incorporated the description in the affidavit by reference.”); *State v. South*, 932 P.2d 622, 625–26 (Utah Ct. App. 1997) (holding that a sufficiently incorporated affidavit cures a facially deficient search warrant as long as the search was confined to areas listed in the affidavit and the magistrate reviewed both the warrant and the affidavit).

121. 998 F.2d 1112 (2d Cir. 1993).

122. *Id.* at 1117 (citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965)) (citations omitted). In *Ventresca*, the U.S. Supreme Court did not invalidate a search warrant and held that “affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A . . . negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.” *Ventresca*, 380 U.S. at 108.

123. *Bianco*, 998 F.2d at 1117. Therefore, since the warrant was considered valid, the court did not have to discuss the good faith exception allowed in *Leon. Id.*

In *United States v. Wuagneux*,<sup>124</sup> the U.S. Court of Appeals for the Eleventh Circuit noted its preference of having both language of incorporation and attachment, but similar to the decisions discussed above, the court acknowledged that the limit on general searches would be served so long as the affidavit was present at the search site.<sup>125</sup> Lastly, in probably one of the more lenient decisions, the U.S. Court of Appeals for the Sixth Circuit in *United States v. Gahagan*<sup>126</sup> reasoned that, even though the warrant did not use language of incorporation (the affidavit was cross-referenced) and the affidavit was in the officer's car instead of being immediately at the scene, the search was valid as long as it was confined to the areas described in the affidavit.<sup>127</sup> This approach, which one commentator calls the "functional equivalence approach,"<sup>128</sup> has been used in many different state courts as well.<sup>129</sup>

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124. 683 F.2d 1343 (11th Cir. 1982).

125. *Id.* at 1351 n.6. *Wuagneux* has been referenced by other circuits to validate searches where the affidavit was only present at the scene. *See, e.g., United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) (holding that "[a]n affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant . . . [or] is merely present at the search" (internal quotation marks omitted)).

126. 865 F.2d 1490 (6th Cir. 1989).

127. *Id.* at 1497–99.

128. *See EchoHawk & EchoHawk, supra* note 105, at 20.

129. *See People v. Staton*, 924 P.2d 127, 132 (Colo. 1996) ("[A]n affidavit can be used to satisfy the Fourth Amendment's particularity requirement if (1) a deficient warrant incorporates a curative affidavit by reference, (2) both documents are presented to the issuing magistrate or judge, and (3) the curative affidavit accompanies the warrant during the execution of the search warrant. Further, . . . we hold that the execution of the search warrant under the supervision and control of the officer who is the affiant obviates the necessity for the affidavit to accompany the warrant when it is executed."); *State v. Matsunaga*, 920 P.2d 376, 380 (Haw. Ct. App. 1996) ("It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." (quoting *Steele v. United States*, 267 U.S. 498, 503 (1925))); *People v. Fragoso*, 386 N.E.2d 409, 413 (Ill. Ct. App. 1979) ("Reference to this document as a factor in determining the validity of a search warrant is clearly permissible where the affidavit is attached to the warrant, incorporated by reference, or as is the case here, where the officer who signed and swore to the affidavit also executed the search warrant." (footnote omitted)); *State v. LeFort*, 806 P.2d 986, 992 (Kan. 1991) ("When the officer executing the search warrant is the affiant who described the property to be searched, and the judge finds there was probable cause to search the property described by the affiant and the search is confined to the area which the affiant described in the affidavit, the search does not affect the substantial rights of the accused and is in compliance with the Fourth Amendment of the Constitution of the United States and Section Fifteen of the Kansas Bill of Rights."); *Daffinrud v. State*, 647 P.2d 443, 445 (Okla. Crim. App. 1982) ("[I]n cases where the executing officer has prior knowledge of the location to be searched, a minor inconsistency . . . does not invalidate [the warrant]." (citation omitted)); *State v. Smith*, 344 N.W.2d 505, 508 (S.D. 1984) ("[A] search warrant must particularly describe the place to be searched, but that requirement is satisfied if the circumstances surrounding the execution of the warrant are such that the officer can, with reasonable effort, ascertain and identify the place intended to be searched." (citation omitted)).

c. *Language of Incorporation and Accompaniment*

Although appearing to be strict, the incorporation plus accompaniment standard gives some leeway to officers who do not physically attach the affidavit to the warrant itself, thereby forming one document. In *United States v. Morris*,<sup>130</sup> the U.S. Court of Appeals for the First Circuit found that “[a]n affidavit may be referred to for purposes of providing particularity if the affidavit accompanies the warrant, and the warrant uses suitable words of reference which incorporate the affidavit.”<sup>131</sup> The U.S. Court of Appeals for the Fifth Circuit, in *United States v. Beaumont*,<sup>132</sup> expressly declined to create a “technical, bright-line rule of [the] Fourth Amendment” and instead held that

the better rule . . . is to require that the warrant contain, at the very least, a cursory reference to the affidavit upon which an executing officer may have to rely. . . . [W]here a warrant contains only the barest of generalized statements the particularity requirement is satisfied by reliance on an affidavit when the affidavit is incorporated by reference into the warrant.<sup>133</sup>

This incorporation plus accompaniment standard has also been invoked by the U.S. Courts of Appeals for the Third,<sup>134</sup> Eighth,<sup>135</sup> and D.C. Circuits<sup>136</sup> when faced with this issue. The D.C. Circuit’s opinion referenced here differs slightly from that of *Dale*.<sup>137</sup> This discrepancy most likely shows that “the court did not intend for the term ‘accompany’ to mean attachment.”<sup>138</sup> This incorporation plus accompaniment approach is also a favorite among the many state courts that have had to rule on this issue.<sup>139</sup>

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130. 977 F.2d 677 (1st Cir. 1992).

131. *Id.* at 681 n.3.

132. 972 F.2d 553 (5th Cir. 1992).

133. *Id.* at 561.

134. *See United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982) (“When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant.”).

135. *See United States v. Curry*, 911 F.2d 72, 77 (8th Cir. 1990) (“[A] description in the supporting affidavit can supply the requisite particularity if a) the affidavit accompanies the warrant, and b) the warrant uses suitable words of reference which incorporate the affidavit therein.” (citations and internal quotation marks omitted)); *id.* at 77 n.4 (“[T]he affidavit must both accompany the warrant and be incorporated into it.”).

136. *See United States v. Maxwell*, 920 F.2d 1028, 1031 (D.C. Cir. 1990) (“[A] search warrant may be construed with reference to the affidavit supporting it for purposes of satisfying the particularity requirement . . . only if (1) the affidavit accompanies the warrant, and in addition (2) the warrant uses suitable words of reference which incorporate the affidavit by reference.” (internal quotation marks omitted)).

137. *See supra* note 116–17 and accompanying text.

138. *EchoHawk & EchoHawk, supra* note 105, at 16 (footnote omitted).

139. *See State v. Moorman*, 744 P.2d 679, 684 (Ariz. 1987) (“For an affidavit to save a defective warrant, it must appear at a minimum that the executing officer had the affidavit with him and referred to it . . . .”); *Battle v. State*, 620 S.E.2d 506, 508 (Ga. Ct. App. 2005) (“[A] warrant that fails to meet the Fourth Amendment’s particularity requirement may be cured by supporting documents if, in addition to being incorporated into the warrant through

d. *Language of Incorporation and Physical Attachment*

The strictest standard imposed by the courts is the language of incorporation plus physical attachment. To date, only one circuit, the U.S. Court of Appeals for the Tenth Circuit, has imposed this rule;<sup>140</sup> however, many state courts have adopted it as well.<sup>141</sup> In *United States v. Leary*,<sup>142</sup> the Tenth Circuit instituted its “one document” approach when it ruled that

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the use of appropriate language, the documents are either attached to or accompany the warrant.”); *State v. Christow*, 371 A.2d 108, 109 n.1 (N.J. Super. Ct. App. Div. 1977) (“The fact that an affidavit is sufficiently explicit does not validate an otherwise invalid warrant unless the affidavit accompanies the warrant and is incorporated in the warrant by suitable words of reference.” (citations omitted)); see *People v. Bennett*, 653 N.Y.S.2d 835, 838 (Sup. Ct. 1996) (recognizing the incorporation and attachment test, but potentially permitting accompaniment); *Ashcraft v. State*, 934 S.W.2d 727, 735 (Tex. Ct. App. 1996) (“A warrant that does not contain the place to be searched, the items to be seized, or the person alleged to be in charge of the premises is not invalid provided that the warrant incorporates by reference a sufficiently specific affidavit to support it[,]” and “[t]he failure to physically attach the affidavit to the warrant is not a violation of the search warrant statutes [so long as] a written inventory be served upon the owner of the premises to be searched.” (citations omitted)); *State v. Jarrells*, No. 32009-6-II, 2005 Wash. App. LEXIS 612, at \*9 n.17 (Wash. Ct. App. Apr. 12, 2005) (“[T]he affidavit accompanies the warrant, and . . . the warrant uses suitable words of reference which incorporate the affidavit therein.” (quoting *United States v. Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1319 (9th Cir. 1981))).

140. The Ninth Circuit appears to be moving in this direction. However, the Court still allows incorporation plus accompaniment. See *United States v. Bridges*, 344 F.3d 1010, 1018 (9th Cir. 2003) (“An affidavit providing more guidance than an overbroad warrant may cure the warrant’s overbreadth only if (1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search.” (internal quotation marks omitted)).

141. See *Sadie v. State*, 488 So. 2d 1368, 1373 (Ala. Crim. App. 1986) (“[T]he deficiency of the warrant’s description can be cured by (1) reference to the warrant’s supporting affidavit, and (2) such affidavit is attached to the warrant at the time of its execution and incorporated by reference in the warrant.”); *Namen v. State*, 665 P.2d 557, 564 (Alaska Ct. App. 1983) (“[I]ncorporation of an extrinsic document must be formally reflected in the warrant; the warrant must, on its face, refer to the extrinsic document that it purports to incorporate, and the intent to incorporate the document must be stated. In addition, a copy of the document incorporated normally must be attached to the warrant, or, at the very least, the warrant must direct that the extrinsic document accompany it at the time of execution.” (citations omitted)); *People v. MacAvoy*, 209 Cal. Rptr. 34, 41 (Cal. Ct. App. 1984) (“An affidavit which meets these two requirements may be considered to remedy a warrant that does not on its face meet the demands of particularity. Without imposing hypertechnical or otherwise undue constraints on law enforcement, this rule operates in a common sense and realistic fashion to advance the vital purpose of the particularity requirement of the Fourth Amendment—the prevention of general exploratory searches which unreasonably interfere with a person’s right to privacy.”); *State v. Santiago*, 513 A.2d 710, 717 (Conn. App. Ct. 1986) (“In determining whether the description given the executing officer was sufficiently detailed, it is of course important initially to examine the description which appears in the warrant itself. If that description is inadequate, however, it is appropriate to look to the description appearing in the warrant application or affidavit if it is clear that the executing officers were in a position to be aided by these documents, as where they were attached to the warrant at the time of execution and incorporated therein by reference.” (quoting *LaFave*, *supra* note 111, § 4.5, at 73–74) (emphasis omitted)); *State v. Kingston*, 617 So. 2d 414, 415 (Fla. Dist. Ct. App. 1993) (“[A]n affidavit will cure a defective search warrant if:

the particularity of an affidavit may cure an overbroad warrant, but only “where the affidavit and the search warrant . . . can be reasonably said to constitute one document. Two requirements must be satisfied to reach this result: first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference.”<sup>143</sup>

Relying on *Leary*, the Tenth Circuit stressed the importance of incorporation and physical attachment in *United States v. Dahlman*,<sup>144</sup> which was decided five years later.

#### E. *The Supreme Court Speaks, but Not Really*

This section analyzes the Supreme Court’s decision in *Groh v. Ramirez*.<sup>145</sup> The section discusses both the majority and dissenting opinions. This decision has set the stage for the ongoing conflict surrounding this issue, which will be discussed below in Part II.

In 2004, the Supreme Court addressed the particularity requirement issue in *Groh v. Ramirez*. In *Groh*, the Bureau of Alcohol, Tobacco, and Firearms was informed that respondent, Ramirez, had a large arms cache at his ranch.<sup>146</sup> Based on that information, petitioner, Special Agent Jeff Groh, signed an application for a search warrant stating that “the search was for any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket

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(1) The affidavit and search warrant are physically connected so that they may be considered one document; and (2) the affidavit is expressly incorporated into the warrant.” (citation omitted)); *Couser v. State*, 374 A.2d 399, 404 (Md. Ct. Spec. App. 1977) (“[T]he affidavit was specifically incorporated by reference and became part of the application in regard to the persons, premises and vehicle to be searched.”); *State v. Balduc*, 514 N.W.2d 607, 610 (Minn. Ct. App. 1994) (“[A]n affidavit may be used to cure a deficient warrant if the affidavit and warrant are physically attached to one another and the warrant refers to the affidavit and incorporates it by reference.” (internal quotation marks omitted)); *State v. Komegay*, 326 S.E.2d 881, 894 (N.C. 1985) (“It is not necessary that the warrants use the magic words ‘incorporated by reference’ in order to make the attached application a part of the warrants. The clear import of the language used in the warrants is that the attached applications are part of the warrants.”); *State v. Schmitz*, 474 N.W.2d 249, 253 (N.D. 1991) (“[T]he generality of a warrant cannot be cured by the specificity of the affidavit unless the affidavit is physically connected to the warrant, and the warrant specifically refers to and incorporates the affidavit.”); *Commonwealth v. Bagley*, 596 A.2d 811, 824 (Pa. Super. Ct. 1991) (“[S]uppression will not be required where an adequate description is contained in the affidavit of probable cause and the affidavit has been incorporated by reference and is attached to the warrant.”); *State v. Mack*, 188 S.W.3d 164, 171 (Tenn. Crim. App. 2004) (“[T]he presumption is that an affidavit is not part of a search warrant, even if the two documents are served together, or are both found on the same sheet of paper. If, however, there is explicit reference to the affidavit in the search warrant, the affidavit may be considered part of the warrant.” (internal quotation marks omitted)).

142. 846 F.2d 592 (10th Cir. 1988).

143. *Id.* at 603 (quoting LaFave, *supra* note 111, § 4.6(a), at 241).

144. 13 F.3d 1391, 1395 (10th Cir. 1993) (quoting *Leary*, 846 F.2d at 603).

145. 540 U.S. 551 (2004).

146. *Id.* at 554.



launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.”<sup>147</sup> Groh also signed an affidavit, which stated the basis for his belief that the items were on the ranch.<sup>148</sup>

The warrant was signed by a magistrate; however, the warrant itself did not identify any of the items that Groh intended to seize—it only listed a description of Ramirez’s house.<sup>149</sup> The warrant also failed to include any language of incorporation referencing the affidavit or warrant application.<sup>150</sup>

The warrant was executed, and upon completion of the search, the officers gave Ramirez’s wife a copy of the warrant; however, they did not give her a copy of the warrant application because it had been sealed.<sup>151</sup> Ramirez sued Groh and other officers raising eight claims,<sup>152</sup> including violation of his Fourth Amendment right—specifically, he cited the failure of the warrant to particularly describe the persons or things to be seized.<sup>153</sup>

In its decision, the Supreme Court recognized the fact that an “*application* [that] adequately described the ‘things to be seized’ does not save [a] *warrant* from its facial invalidity.”<sup>154</sup> However, the Court also acknowledged that the Fourth Amendment does not prohibit a warrant from cross-referencing outside documents.<sup>155</sup> The Court accepted the fact that “most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.”<sup>156</sup> However, the Court found no need to establish a bright-line rule. Since the warrant in this case neither had language of incorporation, nor was accompanied by the warrant application

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147. *Id.* (internal quotation marks omitted).

148. *Id.*

149. *Id.*

150. *Id.* at 554–55.

151. *Id.* at 555.

152. Ramirez sued under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983 (2000). In *Bivens*, the petitioner brought suit in federal district court claiming that he suffered great humiliation and mental suffering as a result of the federal agents’ unlawful, warrantless search. *Bivens*, 403 U.S. at 389–90. Petitioner sought \$15,000 in damages from each of the federal agents. *Id.* at 390. In this case, the Court held that “the Fourth Amendment operates as a limitation upon the exercise of federal power . . . [and] guarantees to citizens . . . the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.” *Id.* at 392. The Court allowed petitioner to pursue his claim of damages reasoning that “where legal rights have been invaded, and a federal statute [here, 42 U.S.C. § 1983 (2000)] provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (internal quotation marks omitted)).

153. *Groh*, 540 U.S. at 556.

154. *Id.* at 557.

155. *Id.*

156. *Id.* at 557–58.

or the affidavit, the Court decided that it “need not further explore the matter of incorporation.”<sup>157</sup>

Going beyond that actual incorporation/accompaniment issue, the Court further rejected Groh’s argument that “a search conducted pursuant to a warrant lacking particularity should be exempt from the presumption of unreasonableness if the goals served by the particularity requirement are otherwise satisfied.”<sup>158</sup> Here, the Court ruled that, unless the items seized were set forth in the warrant, it would be unreasonable to presume that the magistrate “agreed that the scope of the search should be as broad as the affiant’s request.”<sup>159</sup> Finally, the Court rejected the exception noted above that the warrant could be cured if the affiant was the officer who executed the search.<sup>160</sup> The Court held that this exception was not valid in this case “[b]ecause petitioner did not have in his possession a warrant particularly describing the things he intended to seize . . . .”<sup>161</sup>

Justice Clarence Thomas, joined by Justice Antonin Scalia, dissented from the majority, refusing to treat the search as a warrantless one. Thomas acknowledged the confusion regarding the “[Fourth] Amendment’s history, which is clear as to the Amendment’s principal target (general warrants), but not as clear with respect to when warrants were required, if ever.”<sup>162</sup> Due to the lack of guidance from the history of the Fourth Amendment, Thomas noted that the Court has “vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard,” and came to the conclusion, after reviewing a history of Supreme Court decisions, that the “cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.”<sup>163</sup>

In this case, Thomas recognized that the principal protection of the warrant requirement was that it “interposed a magistrate between the citizen and the police . . . so that an objective mind might weigh the need to invade [the searchee’s] privacy in order to enforce the law.”<sup>164</sup> Therefore, the contents of the warrant are “simply manifestations of this protection,” so that when a magistrate reviews both the warrant and warrant application, “a searchee still has the benefit of a determination by a neutral magistrate that

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157. *Id.* at 558.

158. *Id.* at 560.

159. *Id.* at 561. This point, however, does not make much sense since Groh was the affiant in this case and he personally presented the warrant application to the magistrate who signed it, thereby implying that he authorized the seizure of everything in the application. See LaFave, *supra* note 111, at 617–18.

160. See *supra* notes 121–29 and accompanying text.

161. *Groh*, 540 U.S. at 563. Again, this last argument does not seem to coincide with the Court’s holding that “neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search.” *Id.* at 562 n.5.

162. *Id.* at 572 (Thomas, J., dissenting).

163. *Id.* at 572–73.

164. *Id.* at 575 (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)) (alteration in original).

there is probable cause to search a particular place and to seize particular items.”<sup>165</sup> In this case, then, Thomas found that since “[t]he Magistrate reviewed all of the documents and signed the warrant application and made no adjustment or correction to this application . . . the respondents here received the protection of the Warrant Clause . . . .”<sup>166</sup>

As a result of the *Groh* decision, little, if anything, was settled in this area of the law. While it appeared that the Court favored an incorporation plus accompaniment approach, the fact that the Court did not set forth this rule allowed the various courts of appeals to continue to adhere to their own rules.

## II. MORE OF THE SAME POST-GROH: CIRCUITS DIFFER ON APPROACH TO INCORPORATION AND ACCOMPANIMENT OF AFFIDAVIT

In the short time since the Supreme Court’s ruling in *Groh*, only some of the circuits have ruled on this issue.<sup>167</sup> However, since the decision did not set forth a bright-line rule, or at the very least require something more than mere language of incorporation, the circuits have once again espoused different standards when faced with the warrant/supporting document issue. Part II.A analyzes those circuits that have taken up the issue since *Groh* and followed the majority’s opinion, which would require something more than just incorporation. Part II.B discusses the circuits that read *Groh* in a very narrow way—interpreting it as more advisory than mandatory—and as a result have continued to analyze this issue using their pre-*Groh* standards.

### A. Courts Following *Groh*: Incorporation and Accompaniment

This section analyzes recent decisions in the U.S. Courts of Appeals for the Third and Ninth Circuits and discusses how these cases reflect those courts’ decision to institute a stricter standard for law enforcement to comply with the Fourth Amendment’s particularity requirement. Part II.A.1 looks at the Third Circuit’s decision in *Doe v. Groody*<sup>168</sup> and analyzes both the majority’s opinion and then-Judge Samuel Alito’s dissent, with both opinions clearly showing the different viewpoints of how the Fourth Amendment should be read in light of the incorporation issue. Part II.A.2 looks at the Ninth Circuit’s recent decision in *United States v. Grubbs*.<sup>169</sup>

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165. *Id.* at 575–76.

166. *Id.* at 576.

167. Not all of the decisions are discussed below because in some cases, e.g., *United States v. Gamboa*, 439 F.3d 796, 807 (8th Cir. 2006), the court quickly dismissed the issue since the affidavit was incorporated and attached to the warrant.

168. 361 F.3d 232 (3d Cir. 2004).

169. No. 03-10311, 2004 U.S. App. LEXIS 24997 (9th Cir. July 26, 2004).

### 1. Third Circuit: Incorporation and Accompaniment

Less than a month after *Groh*, the Third Circuit ruled on the attachment issue in *Doe v. Groody*.<sup>170</sup> In *Groody*, Drug Enforcement Administration officers sought to obtain a search warrant in order to search the residence of a suspected drug dealer.<sup>171</sup> The affidavit in support of the warrant application requested permission to search his residence and car for drugs and drug paraphernalia as well as any other occupants of the house because “drug dealers often attempt to [hide drugs on others] when faced with impending apprehension and may give such evidence to persons who do not actually reside [at the premises] . . . in hopes that said persons will not be subject to search when police arrive.”<sup>172</sup> However, on the actual warrant, in the area reserved for places and/or persons to be searched, “the attached typed affidavit was not mentioned.”<sup>173</sup> When officers executed the warrant, Doe was not present at the premises; however, his wife and ten-year-old daughter were present, so officers searched them both.<sup>174</sup> Doe brought this action against Groody pursuant to 42 U.S.C. § 1983 alleging an illegal strip search.<sup>175</sup>

In this case, the majority reasoned that “to take advantage [of reading the affidavit with the warrant], the warrant must expressly incorporate the affidavit.”<sup>176</sup> Furthermore, the court held that the affidavit must accompany the warrant.<sup>177</sup> Although this ruling seemed to imply that the court favored a bright-line rule, the court specified two categories where an unincorporated affidavit could save a defective warrant: 1) where there has been a clerical error, and 2) where the affidavit modifies an otherwise overbroad warrant.<sup>178</sup> In this case, though, the court read the affidavit to expand the face of the warrant because it called for the search of anyone else on the premises.<sup>179</sup> The warrant, not the affidavit, gives the officers the authority to search; therefore, the court found that it could not save an

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170. 361 F.3d 232 (3d Cir. 2004). This case became much more famous as a result of Justice Samuel Alito’s dissent and his subsequent nomination to the Supreme Court. See *infra* note 191.

171. *Id.* at 235.

172. *Id.* at 236.

173. *Id.*

174. *Id.* at 236–37. Both Jane and Mary Doe were subjected to a strip and full cavity search. *Id.*

175. *Id.* at 237.

176. *Id.* at 239 (emphasis added).

177. *Id.*

178. *Id.* at 240–41. Here, the court cites *United States v. Bianco*, 998 F.2d 1112, 1116–17 (2d Cir. 1993), and explains this exception to mean that, so long as the officers know the limits of the search, as outlined in the affidavit, the search would be valid. In the present case, the affidavit actually broadened the search as compared to the face of the warrant since the affidavit called for the search of anyone on the premises. The court also recognized the fact that warrants are prepared in a hasty fashion, but held that “without a clear reference to the affidavit in the warrant, the [affidavit] cannot simply be assumed to broaden the [warrant]. Otherwise, we might indeed transform the judicial officer into little more than the cliché ‘rubber stamp.’” *Id.* at 243.

179. *Id.* at 241.

overbroad search if the police “exceed the full measure of the warrant” because “it is one thing if officers use *less* than the authority erroneously granted by a judge. It is quite another if officers go *beyond* the authority granted by the judge.”<sup>180</sup> Allowing the officers to use the affidavit to expand the search would allow the exception to swallow the rule and displace the role that the neutral magistrate plays in the warrant process.<sup>181</sup>

In a strongly worded dissent, Alito wrote that under the reasoning in *Ventresca*,<sup>182</sup> warrants must be read in a commonsense and non-legalistic fashion because they are not drafted by attorneys.<sup>183</sup> Alito focused on the fact that the warrant and affidavit were both presented to the magistrate who “carefully reviewed [the] documents and signed the warrant without alteration.”<sup>184</sup> Alito reasoned that since the magistrate saw both documents and signed the warrant, he intended, therefore, to authorize the search of everyone on the premises.<sup>185</sup> In terms of incorporation and accompaniment, Alito found that the affidavit was “indisputably incorporated . . . with respect to the issue of probable cause . . .”<sup>186</sup> Consequently, Alito came to the conclusion that since the magistrate saw both documents and made no changes, the officers would be justified in believing that they were authorized to search all occupants on the premises.<sup>187</sup>

Alito also attacked the majority’s holding because the affidavit was cross-referenced in another place on the warrant—the box concerning probable cause—but was not mentioned in the area labeled persons and places to be searched.<sup>188</sup> Alito criticized the majority’s holding as reading “the warrant . . . almost as if it were a contract subject to the doctrine of *contra proferentum*.”<sup>189</sup> This reading ran contrary to the Supreme Court’s decision in *Groh*, which Alito understood to be that the appropriate words of incorporation should be “judged by the ‘commonsense and realistic’ standard that is generally to be used in interpreting warrants.”<sup>190</sup> Justice Alito’s dissent in *Groody* became a point of contention during his Senate confirmation hearing.<sup>191</sup>

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180. *Id.*

181. *Id.*

182. See *supra* note 122 and accompanying text.

183. *Groody*, 361 F.3d at 245 (Alito, J., dissenting).

184. *Id.* at 246.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 247. The officers testified that they ran out of room on the warrant, and this is why they did not use language of incorporation on the face of the warrant. *Id.* at 246 n.11.

189. *Id.* at 248.

190. *Id.*

191. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006). In the hearing, Alito was questioned about his dissent by Senator Patrick Leahy. In defending his opinion, Alito stated that the magistrate who was

## 2. Ninth Circuit: Incorporation, Accompaniment, and Presentation

In *United States v. Grubbs*,<sup>192</sup> the Ninth Circuit reiterated its previous position—a position it stated has “long been in accord with the Supreme Court’s reasoning in *Groh*”—that a facially insufficient search warrant could be cured by an affidavit only if: (1) the affidavit is incorporated into the search warrant, and (2) the affidavit accompanies the warrant.<sup>193</sup> The court went on further to define “accompany” to mean that the affidavit must be presented at the time of the search “in order to limit officers’ discretion in conducting the search, but also in order to ‘inform the person subject to the search what items the officers executing the warrant can seize.’”<sup>194</sup> This standard is effectively an incorporation plus attachment requirement on the officers executing the search warrant.

This last point—assuring the individual of the limits of the search—has been referenced in other cases before the Supreme Court.<sup>195</sup> This line of reasoning appears to add another view on that purpose of search warrants: not only are they supposed to show that a neutral magistrate has reviewed the warrant and supporting documents as well as limit the scope of the executing officers’ discretion, but, as these cases point out, the warrant is also supposed to provide assurances to the searchee of the limits of the search. The Supreme Court in *Groh* referenced this line of reasoning stating that “[a] particular warrant also ‘assures the individual whose property is searched or seized of the lawful authority of the executing

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presented the warrant acknowledged that the affidavit was incorporated for the purpose of probable cause. *Id.* at 332. Furthermore, since warrants are prepared under time pressure, they should be read in a commonsense fashion. *Id.* Consequently, Alito reasoned that the magistrate authorized the officers to conduct the search on the premises, and, as a result, the search was permissible. Therefore, the officers should not have been able to be sued for damages “if a reasonable officer could have believed that [the search was] what the magistrate intended to authorize.” *Id.*

192. No. 03-10311, 2004 U.S. App. LEXIS 24997 (9th Cir. July 26, 2004).

193. *Id.* at \*14–15.

194. *Id.* (quoting *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997) (quoting *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986))) (emphasis omitted).

195. See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621–22 (1989) (“An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope.”); *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (“[T]he possession of a warrant by the officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring ‘the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.’” (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977))); *Camara v. Mun. Court*, 387 U.S. 523, 532–33 (1967) (“The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search . . . . We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.”).

officer, his need to search, and the limits of his power to search.”<sup>196</sup> However, the Court, in a footnote, acknowledged the fact that

[i]t is true . . . that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search. Rule 41(f)(3) provides that “[t]he officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property.” . . . Whether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the officers’ safe and effective performance of their mission, is a question that this case does not present.<sup>197</sup>

Therefore, if, as the Court suggested, it is permissible for an agent to leave a copy of the warrant after the search has been conducted, then it does not follow that one of the purposes of the warrant requirement is to give a searchee an opportunity *ex ante* to review the search warrant. Consequently, the Ninth Circuit’s reasoning that the warrant is supposed to inform the searchee of what is to be taken before the search is conducted does not hold since the officers can conduct the search and leave the warrant as they are departing the premises. However, in *Groh*, since Ramirez did not request to see the warrant before the search was executed, the Court did not rule on the issue.

#### B. Courts Distinguishing or Limiting *Groh*: *Either Incorporation or Accompaniment*

This section looks at the recent decisions in both the Fourth and Sixth Circuits. Although both courts read the *Groh* decision in the same way, their approaches to the issue differ slightly—the Sixth Circuit decision includes a reasonableness analysis. Part II.B.1 discusses the Fourth Circuit’s opinion in *United States v. Hurwitz*.<sup>198</sup> Part II.B.2 analyzes the Sixth Circuit’s opinion in *Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms*.<sup>199</sup>

##### 1. Fourth Circuit: Either Incorporation or Accompaniment

In *United States v. Hurwitz*, the defendant was overprescribing pain medication to patients who then sold the drugs on the street.<sup>200</sup> The government monitored his behavior, arrested him, and obtained search

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196. *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (quoting *Chadwick*, 433 U.S. at 9).

197. *Id.* at 562 n.5.

198. 459 F.3d 463 (4th Cir. 2006).

199. 452 F.3d 433 (6th Cir. 2006).

200. *Hurwitz*, 459 F.3d at 466.

warrants for his home and medical office.<sup>201</sup> The government agents, in support of the warrant application, submitted an affidavit that “provided details about the investigation of Hurwitz, including evidence obtained with the assistance of five of Hurwitz’s patients.”<sup>202</sup> In the space reserved for persons or property to be seized, the agent wrote “See Attachment A of Affidavit” which “listed specific items the government sought permission to seize . . . .”<sup>203</sup> The magistrate approved the warrant and granted the government’s request to seal the warrant application and affidavit because “revealing the material sought to be sealed would jeopardize an ongoing criminal investigation . . . .”<sup>204</sup> Hurwitz challenged the validity of the warrant since the warrant itself did not particularly describe the items to be seized and because the affidavit did not accompany the warrant.<sup>205</sup>

The Fourth Circuit rejected Hurwitz’s challenge, which was grounded in Hurwitz’s belief that *Groh* instituted a “definitive two-part rule for validating a warrant by incorporation of a separate document”—that is, the warrant must incorporate the affidavit and the affidavit must accompany the warrant.<sup>206</sup> Instead, the Fourth Circuit read *Groh* more narrowly. It held

*Groh*, however, establishes no such rule. Instead, *Groh* simply acknowledges the approach generally followed by the Courts of Appeals. Because neither requirement was satisfied in *Groh*, the Supreme Court declined to further consider the question of incorporation by reference. (“But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation.”)<sup>207</sup>

The court then went on to hold that, in the Fourth Circuit, “it is sufficient *either* for the warrant to incorporate the supporting document by reference *or* for the supporting document to be attached to the warrant itself.”<sup>208</sup> In upholding the validity of the warrant despite the fact that the affidavit was under seal, the court referred back to the *Groh* Court’s holding that “[t]he Fourth Amendment does not require an officer to serve a search warrant before executing it.”<sup>209</sup> The Fourth Circuit went on to hold that “[t]he

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201. *Id.* at 466–69.

202. *Id.* at 469.

203. *Id.*

204. *Id.* at 469 n.3.

205. *Id.* at 470.

206. *Id.* at 471.

207. *Id.* (citations omitted).

208. *Id.*

209. *Id.* at 472 (citing *Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004)); see *Mazuz v. Maryland*, 442 F.3d 217, 229 (4th Cir. 2006) (holding that the Fourth Amendment is not violated if the officer executing the search warrant fails to carry the warrant during the search); see also *United States v. Simons*, 206 F.3d 392, 403 (4th Cir. 2000) (holding that the Fourth Amendment is not violated if the officer executing a search warrant does not leave a copy of the warrant with the property owner after the search is completed). *But see Simons*, 206 F.3d at 403 (stating that failure to leave a copy of the warrant may violate Rule



Constitution protects property owners . . . by interposing, *ex ante*, the deliberate, impartial judgment of a judicial officer’ and ‘by providing, *ex post*, a right to suppress evidence improperly obtained.’”<sup>210</sup> Therefore, the court reasoned that since (1) a neutral magistrate reviewed and approved the warrant, and (2) Hurwitz had a right to challenge both the validity of the warrant and the seizure of items after the search, his Fourth Amendment right was not violated by the agents’ search.

## 2. Sixth Circuit: Incorporation (and Preference for Accompaniment)

In *Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms*,<sup>211</sup> federal agents searched the warehouse of the plaintiff, who was suspected of selling illegal firearms.<sup>212</sup> The agents applied for a search warrant, and, in the supporting affidavit, explained plaintiff’s system for selling the weapons and identified the warehouse to be searched and the guns to be seized.<sup>213</sup> The warrant, however, did not list this information, but instead, in the area marked for description of persons or places to be searched, it said “See Attached Affidavit.”<sup>214</sup> The magistrate signed both the affidavit and the search warrant and then sealed the affidavit to protect the government’s confidential sources.<sup>215</sup> When executing the search, agents encountered one of the plaintiff’s attorneys, who asked to see the affidavit and complained that the search was illegal since the warrant did not particularly describe the places and things to be seized.<sup>216</sup> Thereafter, plaintiff initiated an action seeking damages due to the claimed illegal search.<sup>217</sup>

The Sixth Circuit acknowledged the finding in *Groh* that a warrant application does not necessarily save a warrant; however, the Sixth Circuit found that the reason the warrant was “doomed” in *Groh* was not the fact that the affidavit was not present, rather it was the fact that the affidavit was not cross-referenced at all.<sup>218</sup> Furthermore, the Sixth Circuit found no doubt “whether the Magistrate was aware of the scope of the search he was authorizing” because he signed both documents—the warrant and affidavit.<sup>219</sup>

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41 of the Federal Rules of Criminal Procedure depending on whether the officer intended to violate the rule).

210. *Hurwitz*, 459 F.3d at 472 (quoting *United States v. Grubbs*, 547 U.S. 90, 99 (2006)).

211. 452 F.3d 433 (6th Cir. 2006).

212. *Id.* at 436.

213. *Id.*

214. *Id.*

215. *Id.*; see *supra* notes 99–103 and accompanying text.

216. *Baranski*, 452 F.3d at 436–37.

217. *Id.* at 437. As in *Groh*, Keith Baranski sued under *Bivens* for money damages. *Id.* at 436.

218. *Id.* at 439.

219. *Id.* at 440.

The Sixth Circuit took a different approach than the Fourth Circuit to analyze whether or not the officers needed to have the affidavit accompany the warrant during the search. The Sixth Circuit held that

officers generally should bring an incorporated affidavit (or an authenticated summary of the items to be seized) with them during the search and that the failure to do so may be a *factor* in determining whether the search was reasonable . . . . If, say, a search involved otherwise fungible property that contained discrete identifying markers . . . and if only an incorporated affidavit described those markers, the absence of the affidavit on the scene could render the search unreasonable. But that does not establish that the absence of an incorporated affidavit during a search makes the search a presumptively unreasonable one in all settings, no matter whether the property owner was there, no matter how readily identifiable the subject of the search. The salient point is that *Groh* did not establish a one-size-fits-all requirement that affidavits must accompany all searches to prevent a lawfully authorized search from becoming a warrantless one.<sup>220</sup>

The court, then, did not require the “incorporate and accompany rule” that other circuits read *Groh* to mandate.<sup>221</sup> Instead, the accompaniment of an affidavit will make a search more reasonable, but the absence of the affidavit does not make the search automatically *per se* unreasonable.<sup>222</sup>

In sum, the Sixth Circuit differentiates the issuance of the warrant from the execution of the warrant. So long as the government had a warrant that set forth probable cause, supported by an affidavit, particularly describing the places searched and persons/things to be seized, and this warrant, along with supporting documents, was approved by a neutral magistrate, then the issuance of the warrant was valid.<sup>223</sup> The execution of the warrant cannot invalidate this issuance.<sup>224</sup> However, a warrant that “satisfies the Warrant Clause upon issuance . . . by no means establishes that a search satisfies the Reasonableness Clause upon execution . . . .”<sup>225</sup> So, a warrant that is approved by a neutral magistrate satisfies the warrant requirement, but the execution of the warrant, if conducted outside the parameters approved by the magistrate, could render the search to be unreasonable and in violation of the Fourth Amendment.

### III. BACK TO BASICS: RESPECT FOR THE NEUTRAL MAGISTRATE

This Note has covered various holdings and rationales espoused by different courts when faced with the supporting documents issue. The conflict, however, results from two different theories regarding Fourth Amendment jurisprudence. The courts that require incorporation and

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220. *Id.* at 444 (citation omitted).

221. *See supra* notes 170–97 and accompanying text.

222. *See supra* notes 61–65 and accompanying text.

223. *Baranski*, 452 F.3d at 440–41.

224. *Id.* at 441.

225. *Id.* at 445.

attachment/accompaniment are of the belief that the main protection of the Fourth Amendment is the warrant itself, a warrant that clearly and expressly limits the confines of the search. The courts on the other side of the conflict, the courts that do not require such rigidity in the preparation, issuance, and execution of the warrant, are of the belief that the principal protection of the Fourth Amendment is not the warrant itself, but rather, the objective review by a neutral magistrate ensuring that the search is supported by probable cause and sufficiently limited. This Note advocates that the incorporation of supporting documents issue should be decided in light of the actions taken by the neutral magistrate, and therefore agrees with the recent decisions in both the Fourth and Sixth Circuits.<sup>226</sup>

#### A. *And No Warrants Shall Issue*

The Fourth Amendment was drafted in order to protect citizens from the oppressive use of general warrants.<sup>227</sup> As Justice Thomas noted in his dissent in *Groh*, the protection against this general warrant was not the warrant itself, but rather the neutral oversight by a judicial magistrate.<sup>228</sup> The neutral magistrate must review the warrant application and any supporting documents before authorizing a warrant.<sup>229</sup> Consequently, if a magistrate does not believe that probable cause exists to conduct a search, or believes that the description of the place to be searched or items to be seized is overly broad, then he or she would presumably not approve the warrant and would require the officer to narrow the parameters of the search. This was the exact reasoning behind both the Fourth and Sixth Circuit decisions.<sup>230</sup>

Although the Supreme Court in *Groh* preferred that the affidavit accompany the warrant, it made clear that the warrant did not have to be presented to the searchee prior to the commencement of the search.<sup>231</sup> The Fourth Circuit furthered this argument when it held in *Hurwitz* that officers did not have to serve the warrant before searching, and furthermore the searchee's protections against an overly broad search were (1) the impartial judgment of a magistrate, and (2) the right to suppress illegally obtained evidence after the search had been conducted.<sup>232</sup> Therefore, if the warrant does not have to be served before the execution of the warrant, then it certainly cannot be considered the fundamental protection of the Fourth Amendment. Rather, the principal protection is the fact that a neutral observer has authorized the search, ensuring that a "general warrant" has not been issued.<sup>233</sup>

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226. See *supra* Part II.B.

227. See *supra* notes 164–66 and accompanying text.

228. *Groh v. Ramirez*, 540 U.S. 551, 575–76 (2004) (Thomas, J., dissenting).

229. See *supra* notes 92–98 and accompanying text.

230. See *supra* notes 206–25 and accompanying text.

231. *Groh*, 540 U.S. at 562 n.5.

232. *United States v. Hurwitz*, 459 F.3d 463, 472 (4th Cir. 2006).

233. See *supra* notes 37–48 and accompanying text.

Moreover, the strict rule of incorporation and accompaniment/attachment runs counter to the widely held rule that search warrants be read in a commonsense and realistic fashion because they are not written by lawyers, but by officers who, more often than not, are attempting to procure a warrant quickly in order to seize evidence before it disappears.<sup>234</sup> Therefore, so long as the supporting document is referenced somewhere in the warrant, and both the warrant and supporting document have been reviewed by a neutral magistrate, there should be no reason why the warrant would fail for lack of particularity in violation of the Fourth Amendment.

Furthermore, even if for some reason a warrant were found to be facially invalid due to a failure to fully incorporate a supporting document by suitable words of reference, a search should not be found to be unconstitutional if the magistrate has reviewed and approved both documents.<sup>235</sup> In such a case, an officer would be able to invoke the good faith exception permitted in *United States v. Leon*.<sup>236</sup> In this scenario, an officer would have a good faith belief that the warrant was facially valid since a neutral magistrate would have approved both the warrant and any supporting documents that would further define the scope of the search.

#### B. More Backup for Law Enforcement?

Since the Supreme Court's decision in *Groh*, two Justices have been added to the Supreme Court. *Groh* was a 5-4 decision with Justices Sandra Day O'Connor, John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, and David Souter in the majority. Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Chief Justice William Rehnquist dissented.<sup>237</sup> Should this issue come before the Supreme Court in the future, there is a strong possibility that the Court may hold that mere incorporation is all that is needed to satisfy the particularity requirement. As discussed above, both Justices Scalia and Thomas dissented in the *Groh* decision, finding that so long as the magistrate reviewed the warrant and affidavit, the search was valid.<sup>238</sup> Furthermore, Justice Alito strongly dissented in *Groody*, also finding that incorporation was enough so long as the warrant was reviewed by a neutral magistrate.<sup>239</sup> Chief Justice John Roberts has yet to address this issue. However, in the ten Fourth Amendment cases that he heard during his time on the D.C. Circuit, Roberts sided with law enforcement in every case.<sup>240</sup> Therefore, it seems likely that

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234. See *supra* notes 183-87 and accompanying text.

235. See *supra* notes 184-91 and accompanying text.

236. See *supra* notes 83-87 and accompanying text.

237. See *Groh v. Ramirez*, 540 U.S. 551, 566 (2004) (Kennedy, J., dissenting). Justice Anthony Kennedy, however, found the search warrant to be facially deficient and therefore found the search to be warrantless. Kennedy dissented on the issue of whether or not *Groh* would be protected by qualified immunity. *Id.* at 571.

238. See *supra* notes 162-66 and accompanying text.

239. See *supra* notes 182-91 and accompanying text.

240. See *United States v. Jackson*, 415 F.3d 88, 101-06 (D.C. Cir. 2005) (Roberts, J., dissenting); *United States v. Lawson*, 410 F.3d 735 (D.C. Cir. 2005); *United States v.*

the deciding vote on this issue would come from Justice Kennedy. While a judge on the Ninth Circuit, Kennedy authored two opinions that dealt with the supporting documents issue.<sup>241</sup> In both decisions, Kennedy found that, for the supporting documents to be read in addition to the search warrant, the documents must accompany the warrant, and the warrant must use “suitable words of reference which incorporate the affidavit therein.”<sup>242</sup> However, in the later decision, Kennedy appeared to possibly allow an affidavit to cure the warrant if the affidavit was sufficiently particular so as to guide the officers conducting the search.<sup>243</sup> Therefore, it is probable that, if this issue were to present itself again to the Supreme Court, the outcome would be similar to that of *Groh*, and the view that the issuance of a particularized search warrant is the principal protection of the Fourth Amendment would prevail.

#### CONCLUSION

In a post-9/11 United States, there could be many opportunities for searches to be conducted pursuant to warrants supported by sealed affidavits due to national security concerns. When determining whether the search violated a person’s Fourth Amendment’s right, courts should not apply highly technical tests that focus on whether the affidavit was sufficiently attached or if it accompanied the warrant. Rather, courts should honor the original intent of the Fourth Amendment and find that, so long as a neutral magistrate reviewed all of the documents and approved the warrant, the searchee’s Fourth Amendment right has been protected, and if, for some reason the officers do not adhere to the parameters of the search, then the searchee has the ex-post remedy of suppressing the evidence.

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Moore, 394 F.3d 925 (D.C. Cir. 2005); *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004); *United States v. Holmes*, 385 F.3d 786 (D.C. Cir. 2004); *United States v. Brown*, 374 F.3d 1326 (D.C. Cir. 2004); *Int’l Action Ctr. v. United States*, 365 F.3d 20 (D.C. Cir. 2004); *United States v. Reid*, 89 F. App’x 279 (D.C. Cir. 2004); *see also* *United States v. Riley*, 351 F.3d 1265 (D.C. Cir. 2003); *Stewart v. Evans*, 351 F.3d 1239 (D.C. Cir. 2003).

241. *See* *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986); *United States v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982).

242. *Hillyard*, 677 F.2d at 1340.

243. *Spilotro*, 800 F.2d at 967.

*Notes & Observations*