

WHY IT IS NOT UNREASONABLE FOR THE POLICE TO REFUSE TO PROVIDE A COPY OF THE SEARCH WARRANT AT THE OUTSET OF THE SEARCH

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I. INTRODUCTION

In *Groh v. Ramirez* (“*Groh*”), the United States Supreme Court (“Supreme Court”) asked, in the decision’s fifth footnote, whether it would be unreasonable for the police to refuse to present a copy of a search warrant at the outset of the search “when . . . an occupant of the premises is present and poses no threat to the officers’ safe and effective performance of their mission.”¹ The majority opinion, which was authored by Justice John Paul Stevens, refused to answer the question.²

This Essay will not only answer the Supreme Court’s question, but also use a significant number of legal arguments to explain why it would

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1. *Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004).

2. *See id.* The Supreme Court refused to answer the question because it was not properly before the Court.

not be unreasonable for the government to refuse to present a copy of the warrant prior to the search when the occupant does not pose a threat to the warrant's execution. It is organized as follows.

Part II will provide a discussion of the pertinent portions of the *Groh* decision.

Part III examines search warrant presentment in the context of the Fourth Amendment and Federal Rules of Criminal Procedure.

Part IV argues the reasons the Supreme Court should adopt a *per se* rule stating it would not be unreasonable for the police to refuse to provide a copy of the warrant at the outset of the search. More specifically, this section will focus on some of the *ex ante* and *ex post* protections available to citizens. These protections negate any need for the citizen to view the warrant because they work to ensure that the government does not execute it unreasonably.

Part IV discusses the main argument in support of requiring the police to provide a copy of the search warrant prior to the search.

Lastly, Part V provides the conclusion.

II. *GROH V. RAMIREZ*

In *Groh*'s fifth footnote, the Supreme Court quickly discussed whether the police should provide a copy of the search warrant prior to commencement of the search.³ In its discussion, the Supreme Court noted that the Fourth Amendment did not require executing officials to provide a copy of the search warrant at the outset of the search.⁴ The Supreme Court also noted that the Federal Rules of Criminal Procedure did not require a copy of the warrant be provided prior to commencement of the search.⁵ More specifically, the Supreme Court noted that under Rule 41(f)(3), the executing officer has to only "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 leave a copy of the warrant and receipt at the place where the officer took the property."⁶

After the Supreme Court recognized that neither the Fourth Amendment nor the Federal Rules of Criminal Procedure required a copy of the search warrant be shown prior to the search, it wrote, "[w]hether it would be unreasonable to refuse a request to furnish the

3. *See id.* at 562 n.5.

4. *See id.*

5. *See id.*

6. *Id.* Federal Rules of Criminal Procedure 41(f)(3) is the current Rule 41(f)(1)(C).

warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission, is a question that this case does not present."⁷

III. SEARCH WARRANT PRESENTMENT

A. *The Fourth Amendment Does Not Require Presentment*

The Fourth Amendment is the foundation for any discussions pertaining to search warrants. The amendment 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.⁸

The text of the Fourth Amendment does not address the presentment of search warrants. Consequently, the plain language of the Fourth Amendment does not recognize or provide a constitutional duty to provide a copy of the warrant at the start of the search. Thus, "[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is . . . evidence that" the Framers did not want to provide a constitutional right to view the warrant prior to its execution.⁹

B. *Federal Rule of Criminal Procedure 41(f)(1)(C) Requires Limited Presentment*

Rule 41(f)(1)(C) of the Federal Rules of Criminal Procedure governs the execution of search warrants.¹⁰ Like the Fourth Amendment, Rule 41(f)(1)(C) does not require executing officials to present a copy of the search warrant at the start of the search.¹¹

7. *Id.*

8. U.S. CONST. amend. IV.

9. *United States v. Grubbs*, 547 U.S. 90, 99 (2006) (citing *United States v. Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999)). In *Grubbs*, the defendant argued that the search warrant helped "assur[e] 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." *Id.* at 98 (citation omitted). The Supreme Court disagreed. *See id.* The Court wrote "neither the Fourth Amendment nor Federal Rule of Criminal Procedure 41 imposes such a requirement." *Id.* (citing *Groh*, 540 U.S. at 562 n.5).

10. *See* FED. R. CRIM. P. 41(f)(1)(C).

11. *See id.*

However, unlike the Fourth Amendment, it does, at least, provide some guidance as to when a property owner is entitled to see a copy of the search warrant. More specifically, under Rule 41(f)(1)(C):

[t]he officer executing the warrant must 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 leave a copy of the warrant and receipt at the place where the officer took the property.¹²

The plain language of Rule 41(f)(1)(C) requires the government to provide a copy of the search warrant only if property is taken.¹³ Interestingly, this is the lone presentment requirement in the rule. By clearly noting that the search warrant should only be provided if property is taken, Rule 41 is acknowledging that the warrant does not have to be provided prior to its execution.¹⁴ Moreover, Rule 41 is also recognizing that the search warrant does not have to be provided if the government does not seize any of the citizen's property.¹⁵

IV. DISCUSSION: *EX ANTE* AND *EX POST* PROTECTIONS

The Supreme Court has recognized that the Constitution, through the Fourth Amendment, provides a significant number of *ex ante* and *ex post* protections to citizens. For instance, in *United States v. Grubbs*, the Supreme Court recognized that:

The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the “deliberate, impartial judgment of a judicial officer . . . between the citizen and the police” . . . and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.¹⁶

Because these *ex ante* and *ex post* protections typically work simultaneously, they successfully ensure that the government does not exceed its authority when requesting or executing a search warrant. Thus, these protections negate any need for the citizen to view the warrant.

12. *Id.* (emphasis added by author).

13. *See id.* (emphasis added by author).

14. *See id.* (emphasis added by author).

15. *See id.* (emphasis added by author).

16. *United States v. Grubbs*, 547 U.S. 90, 99 (2006) (emphasis added by court). *Ex ante* is Latin for “before the fact” and *ex post* is Latin for “after the fact.”

A. *Ex Ante Protections*

The following subsections will discuss the primary *ex ante* protections: a) the Fourth Amendment and b) the neutral and detached magistrate.

1. The Fourth Amendment

The main *ex ante* protection derives from the Fourth Amendment's Warrants Clause. This clause states "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."¹⁷ The Warrants Clause is the main *ex ante* protection because it establishes the constitutional requirements for a valid search warrant.¹⁸

More specifically, under the Warrants Clause, a law enforcement official must swear, under oath, that the information contained within the search warrant is true.¹⁹ Moreover, the clause requires the search warrant contain statements or facts that form probable cause to perform the search, as well as identify what items the police intend to seize and what places the police intend to search.²⁰ Any search warrant that does not contain the aforementioned requirements is *per se* unconstitutional and will not be issued or executed by the government.

2. The Neutral And Detached Magistrate

Under the plain text of the Fourth Amendment, a neutral and detached magistrate is not constitutionally required to issue a search warrant. Instead, the Supreme Court has required that a neutral and detached magistrate determine if a search warrant is valid under the Fourth Amendment.²¹ In addition to deciding if a warrant contains probable cause, the neutral and detached magistrate must also ensure the law enforcement official has sworn, under oath, that the information contained within the warrant is true and that the warrant has identified the items being seized and the places being searched.²² In effect, the

17. U.S. CONST. amend. IV.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See Shadwick v. Tampa*, 407 U.S. 345, 349-50 (1972). In *Shadwick*, the Supreme Court held a municipal clerk was neutral and detached even though the clerk was a "member of the civil service, appointed by the city clerk, 'an executive official . . .'" *Id.* at 348.

22. *See* U.S. CONST. amend. IV.

neutral and detached magistrate serves as a constitutional gatekeeper and protects citizens from the actions of an overzealous government.²³

B. Ex Post Protections

1. Criminal Remedies

i. Motions to Suppress

The motion to suppress is one of, if not, the most important *ex post* protection available to citizens. The motion to suppress is vital, because it can lead to the suppression of unconstitutionally seized evidence. Once evidence is suppressed, the government's case becomes significantly more difficult to prove.

The reasons for filing a motion to suppress can be quite broad. However, in the context of search warrant cases, motions to suppress typically cover four specific areas. First, a motion could be filed if the search warrant was not properly executed by the government.²⁴ This specific area covers the reasonableness or unreasonableness of the search. Second, a motion could be filed if the defendant believes the search warrant lacks probable cause.²⁵ Even though the neutral and detached magistrate has determined that the search warrant contains probable cause, the defendant has a right to have the trial judge or appellate justices decide whether the magistrate's rulings were correct.

The final two reasons a motion to suppress can be filed concern attacks on the search warrant itself. For instance, a motion to suppress could be filed if a defendant believes the search warrant "is invalid on its face" or does not properly describe the property being seized and place being searched.²⁶ In effect, the defendant is arguing that any evidence seized from the search warrant should be suppressed because the warrant has a facial defect.

Each state recognizes that illegally seized evidence should be suppressed. Typically, the rationales for suppression are based on either the Federal Constitution, state constitution, or both. In addition, these rationales are based on the principle that any evidence obtained in violation of the law should not be used in a criminal trial.

23. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (noting protections of Fourth Amendment include having a neutral and detached magistrate determine if the government has established enough probable cause to issue a search warrant).

24. See GA. CODE ANN. § 17-5-30 (2010).

25. See *id.*; see also CONN. GEN. STAT. ANN. § 54-33f (2010).

26. See *id.*

ii. Criminal Penalties for Exceeding the Search Warrant's Scope

Several states have enacted statutes criminalizing government officials who exceed the scope of the search warrant.²⁷ These statutes help curb government abuses during the warrant's execution. More specifically, these statutes ensure the police are searching within the parameters of the search warrant.

Typically, a successful prosecution of these statutes requires the government to prove two elements.²⁸ First, the government must prove the executing official "exceeded the authority of the search warrant or exercised the warrant's authority with unnecessary severity."²⁹ The second element addresses the mental state of the executing official.³⁰ In other words, to prove the second element, the prosecution must show the executing official acted with: 1) a specific intent to exceed the warrant's scope or 2) a "reckless disregard for the law."³¹

Any person found guilty of violating these statutes could be subjected to some extremely severe penalties. For example, a person found guilty of violating either of the aforementioned statutes could be heavily fined, imprisoned, or both.³²

iii. Executing Search Warrants Within a Reasonable Time Period

Generally, government officials are required to execute search warrants within a specified time period.³³ These laws ensure that probable cause exists when the search warrant is both issued and executed. In other words, ". . . the probable cause that justifies

27. See 18 U.S.C. § 2235 (2011); IOWA CODE § 808.10 (2011); MICH. COMP. LAWS § 780.657 (2011); OKLA. STAT. tit. 21, § 536 (2010).

28. See Kevin E. Lunday, Note, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 GEO. WASH. L. REV. 278, 290 (1997) (identifying the elements for 18 U.S.C. § 2234, the federal statute prohibiting government officials from exceeding their authority during execution of a search warrant).

29. *Id.*

30. *See id.*

31. *Id.*

32. See 18 U.S.C. § 2235; IOWA CODE § 808.10; MICH. COMP. LAWS § 780.657; OKLA. STAT. tit. 21, § 536.

33. See, e.g., FED. R. CRIM. P. 41(e)(2)(A)(i) (fourteen days); ALA. CODE § 15-5-12 (2011) (ten days); ARIZ. REV. STAT. ANN. § 13-3918 (2011) (five days); GA. CODE ANN. § 17-5-25 (2011) (ten days); IOWA CODE § 808.8 (2011) (ten days); KAN. STAT. ANN. § 22-2506 (2011) (ninety-six hours); MINN. STAT. ANN. § 626.15 (2010) (ten days); W. VA. CODE § 62-1A-4 (2011) (ten days); WIS. STAT. § 968.15 (2010) (five days).

execution [of a search warrant] consists of activity that may change, evolve, or even cease to exist with the passage of time. Probable cause does not depend upon government offices being open, and it does not observe holidays or take weekends off.”³⁴ Thus, states have found it necessary to establish time periods prohibiting the government from using stale probable cause to justify execution of a search warrant. Generally, the executing government official can have anywhere from five to ten days to execute a search warrant after its issuance. If the warrant is not executed within the specified time period, it becomes void.³⁵

iv. Common Law Torts

There are also several remedies available in tort law.³⁶ For instance, a government official, who unreasonably executes a search warrant, could be charged with trespass to land, intentional infliction of emotional distress, or false imprisonment.³⁷ Many of these common law torts are codified in criminal statutes.

2. Civil Remedies

i. 42 U.S.C. § 1983

Initially, 42 U.S.C. § 1983, which is part of the Civil Rights Act of 1871, was enacted to provide African Americans with a weapon to combat civil rights violations that occurred after the Civil War.³⁸ However, since its inception, the statute’s purpose has increased exponentially. “Today, it is a widely used means of enforcing a broad range of rights, providing the basis of most litigation against local governments and local officers for constitutional violations.”³⁹

34. *State v. Miguel*, 101 P.3d 214, 218 (Ariz. Ct. App. 2004).

35. *See, e.g.*, ALA. CODE § 15-5-12 (2011); ARIZ. REV. STAT. ANN. § 13-3918 (2011); GA. CODE ANN. § 17-5-25 (2011); IOWA CODE § 808.8 (2011); KAN. STAT. ANN. § 22-2506 (2011); MINN. STAT. ANN. § 626.15 (2010); WIS. STAT. § 968.15 (2010).

36. *See Knight v. Atl. C. L. R. Co.*, 4 F. Supp. 713, 715 (D. Ga. 1933) (defining a tort as “a legal wrong committed upon the person or property, independent of contract.”).

37. *See also* Alicia M. Hilton, *Alternatives to the Exclusionary Rule After Hudson v. Michigan: Preventing and Remedying Police Misconduct*, 53 VILL. L. REV. 47, 63 (2008) (“... assault, battery, trespass, false imprisonment, false arrest, intentional infliction of emotional distress and breaking and entering.”).

38. *See id.*; *see also* Rebecca L. Bouchard, Note, *The Relationship Between the Individuals with Disabilities Education Act and Section 1983: Are Compensatory Damages an Available and Appropriate Remedy?*, 25 W. NEW ENG. L. REV. 301, 304 (2003).

39. *Id.*

42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .⁴⁰

Section 1983 does not create any substantive rights.⁴¹ Instead, it merely provides a civil remedy for the violation of a constitutional or federal statutory right.⁴² In addition, under 42 U.S.C. § 1983, both citizens and non-citizens can file civil suits against state actors who have infringed on their federal or constitutional rights.⁴³ If a § 1983 claim is successful, the plaintiff could receive attorney fees, compensatory damages, punitive damages, or even a preliminary injunction.⁴⁴

ii. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court ruled that citizens could recover damages for Fourth Amendment violations.⁴⁵ The Court wrote, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁴⁶ The Court recognized that the plain text of the Fourth Amendment did not provide relief to *Bivens*.⁴⁷ However, the Court noted, “it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”⁴⁸

40. 42 U.S.C. § 1983 (2011).

41. See *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) (discussing 42 U.S.C. § 1983).

42. See *id.*

43. See J. Matthew Mauldin, Note, *Single Hiring Decisions and Municipal Entities: The United States Supreme Court's Latest Safeguard Against Municipal Liability Under 42 U.S.C. § 1983*, *Board of the County Comm'rs v. Brown*, 117 S. Ct. 1382 (1997), 20 U. ARK. LITTLE ROCK L.J. 327, 334 (1998).

44. See *id.* at 332; see also *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985).

45. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

46. *Id.*

47. See *id.* at 396.

48. *Id.*

V. COUNTERARGUMENT

The strongest argument in favor of requiring the police to present a copy of the search warrant prior to the search was put forth in the case of *United States v. Thompson*.⁴⁹ The *Thompson* opinion essentially stated that the Fourth Amendment's Reasonableness Clause mandated presentment of the search warrant. This argument fails on the merits. First, this argument ignores the significant importance of the plain language of the Fourth Amendment and Federal Rule of Criminal Procedure 41(f)(1)(C). Second, this argument ignores the numerous *ex ante* and *ex post* protections available to citizens before and after the search warrant is issued.

A. *United States v. Thompson*

Under the Reasonableness Clause, all government searches must be conducted in a reasonable manner. When determining if a search is reasonable, the courts examine the totality of the circumstances surrounding the search. In *Thompson*, the court wrote, “[t]o satisfy the Reasonableness Clause, officers not only must obtain a valid warrant but they also must conduct the search in a reasonable manner . . . The willingness (or unwillingness) of officers to present a warrant to an occupant when asked goes to the reasonableness of a search.”⁵⁰

The court acknowledged that the Supreme Court had consistently held that neither the Fourth Amendment nor the Federal Rules of Criminal Procedure requires the search warrant be presented prior to the search.⁵¹ However, in this case, several factors led the court to believe execution of the search warrant was unreasonable.⁵²

First, the government could not provide any reasons supporting the agents' refusal to show Mrs. Thompson a copy of the warrant.⁵³

49. *United States v. Thompson*, 667 F. Supp. 2d 758 (S.D. Ohio 2009). The following is a quick overview of the facts from *Thompson*. In June 2008, Bureau of Alcohol, Tobacco, Firearms and Explosives agents (“agents”) executed a search warrant at the residence of the defendant, Terry Thompson. The only person present during the search was the defendant's wife, Marian Thompson (“Mrs. Thompson”). When agents entered the home, they found Mrs. Thompson naked in the kitchen. The agents allowed her to put on a t-shirt. After putting on her t-shirt, Mrs. Thompson was forced to wait on her patio while the police executed the search warrant. She remained on her patio throughout the entire five hours of the search and was not allowed to eat or drink. While the search warrant was being executed, the agents repeatedly denied Mrs. Thompson's several requests to see a copy of it. Eventually, she was provided a copy of the warrant at the end of the search.

50. *See id.*

51. *See id.*

52. *See id.* at 764.

53. *See id.*

Second, the government could not identify any exigent circumstances that supported the agents' refusal to show Mrs. Thompson a copy of the search warrant.⁵⁴ Third, Mrs. Thompson testified she was afraid the agents were thieves because they refused to show her a copy of the warrant.⁵⁵ Fourth, Mrs. Thompson was forced to wait on her patio, in the middle of June, while the warrant was being executed.⁵⁶ In fact, she was not allowed to have any food or water while she waited on her patio.⁵⁷ Fifth, Mrs. Thompson was forced to dress while agents pointed their guns at her.⁵⁸ Moreover, she was not allowed to put on any underwear while she was waiting on the patio.⁵⁹ Sixth, "[t]he officers who searched Mrs. Thompson's home had secured the premises and had Mrs. Thompson in a confined area where spoliation of evidence would not be an issue."⁶⁰ Lastly, Mrs. Thompson cooperated with the agents and did not interfere with their execution of the search warrant.⁶¹

VI. CONCLUSION

In conclusion, there are numerous reasons why it would not be unreasonable for the police to refuse to provide an occupant of the premises a copy of the search warrant at the outset of the search "when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission."⁶² First, neither the plain text of the Fourth Amendment nor the plain text of Federal Rule of Criminal Procedure 41 requires it. Second, there are numerous constitutional and statutory protections that ensure the executing official does not wrongfully execute the warrant.

In essence, requiring the police to provide a copy of the search warrant prior to conducting the search would contradict many of the Fourth Amendment's purposes. As the Supreme Court recognized, the Fourth Amendment does not give individuals "license to engage the police in a debate over the basis for the warrant."⁶³ Our nation has a judicial system and judicial actors—such as judges, prosecutors, and

54. *See id.*

55. *See id.*

56. *See id.* at 765.

57. *See id.*

58. *See id.* at 764.

59. *See id.* at 765.

60. *Id.*

61. *See id.*

62. *Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004).

63. *United States v. Grubbs*, 547 U.S. 90, 99 (2006).

defense attorneys—that address the actions of an overreaching government. Allowing ordinary citizens to substitute themselves for these judicial actors is not only irresponsible, but completely contradictory to the ideals and requirements of our Constitution.