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Nineteen Years and Counting: Resolving the Deep Circuit Split over Whether Failure to Attach a Properly Incorporated Supporting Document to a Search Warrant Violates the Fourth Amendment's Warrant Clause

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NINETEEN YEARS AND COUNTING: RESOLVING THE DEEP CIRCUIT SPLIT OVER WHETHER FAILURE TO ATTACH A PROPERLY INCORPORATED SUPPORTING DOCUMENT TO A SEARCH WARRANT VIOLATES THE FOURTH AMENDMENT'S WARRANT CLAUSE

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"This is an age in which one cannot find common sense without a search warrant."

– George F. Will

I. INTRODUCTION

The plain text of the Fourth Amendment requires the search warrant itself to particularly describe the place to be searched, and the person or things to be seized. However, many federal courts have found the particularity requirement could be satisfied by properly incorporating a supporting document into a search warrant.[2] Nevertheless, these courts differ on whether failure to attach a properly incorporated supporting document to the search warrant violates the Fourth Amendment.

For instance, the federal Courts of Appeals for the First, Third, Eighth, Ninth, Tenth, and District of Columbia have held failure to attach the supporting document to the search warrant violates the Fourth Amendment.[3] In contrast, the federal Courts of Appeals for the Fourth, Sixth, and Eleventh federal circuits, have held failure to attach the supporting document to the search warrant does not violate the Fourth Amendment.[4] This Article will advocate adoption of the majority perspective by analyzing the history

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2. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 557-58 (2004).

3. Bartholomew v. Pennsylvania, 221 F.3d 425, 429 (3d Cir. 2000); United States v. McGrew, 122 F.3d 847, 850 (9th Cir. 1997); United States v. Dahlman, 13 F.3d 1391, 1395 (10th Cir. 1993); United States v. Dale, 991 F.2d 819, 846-47 (D.C. Cir. 1993); United States v. Morris, 977 F.2d 677, 681 n.3 (1st Cir. 1992); United States v. Curry, 911 F.2d 72, 76 (8th Cir. 1990). These federal circuits follow the majority perspective for search warrant incorporation.

4. Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms, 452 F.3d 433, 440 (6th Cir. 2006); United States v. Hurwitz, 459 F.3d 463, 471 (4th Cir. 2006); United States v. Wuagneux, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982). These federal circuits follow the minority perspective for search warrant incorporation.

of the Fourth Amendment, caselaw from the majority and minority perspectives, and the public policies underlying the Fourth Amendment.

Part I will provide a brief history of the Fourth Amendment and Part II will examine the constitutional requirements for a valid search warrant.

Part III will discuss the deep federal circuit split surrounding this issue. In addition, this section will also analyze several opinions from both the majority and minority perspectives.

Part IV will analyze the United States Supreme Court's ("Supreme Court") decision in *United States v. Groh* ("*Groh*"). This is the Supreme Court's most recent decision addressing search warrant incorporation.

Part V will discuss the public policies underlying the Fourth Amendment and Part VI will address whether the *United States v. Leon* ("*Leon*") exception to the exclusionary rule applies to four different scenarios involving a search warrant and its supporting document.

II. A BRIEF HISTORY OF THE FOURTH AMENDMENT

The history underlying the Fourth Amendment is unique because it has foundations in both colonial America and England.[5] The following sub-sections will provide an in-depth discussion of the Fourth Amendment by examining some of the historical events and cases that impacted the adoption and modern interpretation of it.

A. Historical Developments Prior to Adoption of the Fourth Amendment

The Fourth Amendment is the foundation of all searches and seizures conducted by government officials. Prior to enacting this amendment, the government had unfettered power to search and seize any person, place, or thing.[6] There was no mechanism to protect citizens from government intrusion into their private homes. In effect, "[o]nce in a house, in other words, everything was fair game. And law enforcement officials could decide whether to arrest suspects without any oversight."[7] The Fourth Amendment, which was adopted by Congress in 1789 and became a part of the Bill of Rights in 1791, ended this type of intrusive government behavior.

Two separate clauses are contained within the actual text of the Fourth Amendment. The first clause prohibits unreasonable searches and seizures.[8] The second clause, known as the Warrant Clause, mandates probable cause support every search warrant issued by the government.[9]

5. *See* Gov't Printing Office, *Fourth Amendment: Search and Seizure* 1199 (2002), http://origin.www.gpoaccess.gov/constitution/pdf/con015.pdf.

6. *See* Harold J. Krent, *The Continuity Principle, Administrative Constraint, and the Fourth Amendment*, 81 NOTRE DAME L. REV. 53, 57 (2005).

7. *Id.*

8. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557 (1999).

9. *Id.*

The Warrant Clause, which states: "no Warrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," governs how the federal government issues search warrants.[10]

"Interpreted literally, the Amendment requires neither a warrant for each search or seizure, nor probable cause to support a search or seizure. Nevertheless, the Supreme Court imposes a presumptive warrant requirement for searches and seizures and generally requires probable cause for a warrantless search or seizure to be 'reasonable.'"[11]

Our Founding Fathers developed the Fourth Amendment's Warrant Clause, because they wanted to end the use of general warrants.[12] General warrants, which were search warrants lacking an oath or probable cause, provided government officials with the ability to conduct a blanket search of a home.[13] In addition, any evidence discovered during the search could be used against the citizen.

1. Semayne's Case (1603)

Although *Semayne's Case*[14] was a civil case, it had a significant impact on the development of the Fourth Amendment. In *Semayne's Case*, Richard Gersham ("Gersham") and George Berisford ("Berisford") owned a home in London, England.[15] Berisford died and left some items to Peter Semayne ("Semayne").[16] Semayne did not receive these items and sued to gain possession of them.[17] These items were eventually recovered by a sheriff.[18] The sheriff, acting under the powers of a government issued writ, broke doors and entered Berisford and Gersham's home.[19]

The court held, "the sheriff may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . ."[20] In addition, the court also noted, "the house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose."[21] Hence, the ruling of *Semayne's Case* recognized the right of a homeowner to protect his home from unlawful entry by government agents.[22] However, the court also recognized that a government agent could break and enter a

10. U.S. CONST. amend. IV.

11. Keith Shotzberger, *Twenty-Sixth Annual Review of Criminal Procedure: I. Investigation and Police Practices*, 85 GEO. L.J. 821, 821 (1997).

12. *See* Davies, *supra* note 8, at 555.

13. *Id.*

14. (1603) 77 Eng. Rep. 194 (K.B.).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 195.

20. *Id.*

21. *Id.*

22. Gov't Printing Office, *supra* note 5, at 1199.

person's home if the agent provided notice and had a court order to arrest or execute a governmental process.[23]

The years following *Semayne's Case* consisted of more legal attacks against government execution of general warrants. The most notable of these attacks were the *Writs of Assistance Case*, *Wilkes v. Woods* ("*Wilkes*"), and *Entick v. Carrington* ("*Entick*").

2. The Writs of Assistance Case (1761)

American colonists were consistently subjected to the horrible effects of general warrants and writs of assistance ("writs").[24] King George II issued writs that allowed British officials to search for imported goods that had not been taxed.[25] The writs issued by King George II were extremely broad and general. For instance, these writs allowed state officials to "enter any house or other place to search for and seize 'prohibited and uncustomed' goods . . . ."[26] Some of King George's writs even forced colonists to aid state officials in the execution of their searches.[27]

The writs were effective for only six months after the death of the sovereign.[28] Thus, when King George died in 1760, British officials had to obtain new writs.[29] However, colonists challenged the issuance of new writs, because they were upset with the government's use of them.[30]

In particular, James Otis, an American colonist, argued that the writs were unlawful.[31] He believed "[the writs] granted 'a power that places the liberty of every man in the hands of every petty officer.'"[32] Otis also noted that the writs allowed government officials to "enter our houses when they please . . . break locks, bars and everything in their way."[33] He recognized that, "no man, no court can inquire – bare suspicion without oath is sufficient [to issue a writ]."[34] Otis lost his case, but his arguments did not go unnoticed. In response to Otis's arguments, the Massachusetts General Assembly enacted stricter requirements for obtaining writs.[35] For example, one new requirement shortened the duration of writs.[36]

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23. *Id.*

24. *See id.* at 1200. "[W]rits of assistance . . . were general warrants authorizing the bearer to enter any house or other place to search for and seize 'prohibited and uncustomed' goods, and commanding all subjects to assist in these endeavors." *Id.*

25. *See* Krent, *supra* note 6, at 57.

26. Gov't Printing Office, *supra* note 5, at 1200.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Krent, *supra* note 6, at 58.

32. *Id.* (quoting M. H. Smith, THE WRITS OF ASSISTANCE CASE 342 (1978)).

33. *Id.* (quoting M. H. Smith, THE WRITS OF ASSISTANCE CASE 342 (1978)).

34. *Id.* (quoting M. H. Smith, THE WRITS OF ASSISTANCE CASE 342 (1978)).

35. *Id.*

36. *Id.*

3. *Wilkes v. Wood* (1763)

Shortly after the *Writs of Assistance Case*, the English courts were faced with the case of *Wilkes v. Wood*, a civil case for damages.[37] In *Wilkes*, John Wilkes ("Wilkes") published pamphlets that attacked the King and British government.[38] Government officials were provided with an extremely broad general warrant that allowed them "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intitled [sic], the North Briton, No. 45 . . . and them, or any of them, having found, to apprehend and seize, together with their papers."[39] This warrant was used to not only arrest Wilkes, but also seize his books and papers.[40]

Wilkes successfully sued the government official responsible for the search and received a judgment of one thousand pounds.[41] The court sided with Wilkes for several reasons. It recognized this warrant lacked probable clause, because it was "based on information 'which had not the least shadow of probability in it.'"[42] Additionally, this same general warrant was used for later searches.[43] In fact, this one general warrant had been used to search at least five private residences and arrest over forty British subjects.[44] During the execution of this general warrant, government officials even forced one person out of bed in the middle of the night.[45]

Two years after *Wilkes*, the British courts addressed the use of another general warrant in *Entick v. Carrington*.[46]

4. *Entick v. Carrington* (1765)

In *Entick*, the British government used a general warrant to search the home of John Entick, an associate of John Wilkes.[47] Government officials broke into locked desks and seized printed charts, pamphlets, and other materials that belonged to Entick.[48] Entick filed suit against the state for trespass.[49] The court held, "the warrant and the behavior it authorized

37. (1763) 98 Eng. Rep. 489 (K. B.). Wood was the King's Messenger that led the execution of the general warrant.

38. *Id.*

39. Krent, *supra* note 6, at 58. (quoting R. v. Wilkes, (1763) 95 Eng. Rep. 737, [737).

40. Michael Longyear, Note, *To Attach or Not to Attach: The Continued Confusion Regarding Search Warrants and the Incorporation of Supporting Documents*, 76 FORDHAM L. REV. 387, 391 (2007).

41. 98 Eng. Rep. at 499; *but see* Longyear *supra* note 40, at 391-92 (noting damages recovered was five thousand pounds).

42. Jon Eldredge, National Perspective, *Detainment of United States Citizens as Enemy Combatants Under a Fourth Amendment Historical Analysis*, 6 J.L. & SOC. CHALLENGES 19, 25 (2004) (quoting William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 757, 888 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

43. *Id.*

44. *Id.*

45. Krent, *supra* note 6, at 58.

46. (1765) 95 Eng. Rep. 807 (K.B.).

47. Gov't Printing Office, *supra* note 5, at 1200. Nathan Carrington was the King's messenger that led the group of officials that entered Entick's home.

48. *Id.*

49. Thomas K. Clancy, *What is a "Search" within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 5 (2006).

[was] subversive 'of all the comforts of society.'"[50] It also noted, "the issuance of a warrant for the seizure of all of a person's papers rather than only those alleged to be criminal in nature [was] 'contrary to the genius of the law of England.'"[51]

Entick has been praised as a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and "a guide to an understanding the Framers [intent] in writing the Fourth Amendment."[52]

5. The Townshend Act (1767)

The debates over writs and general warrants did not cease with *Entick*. In 1767, the English government passed the Townshend Act. The Act was passed to "eliminate lingering questions over the legality of writs of assistance."[53] In fact, the Attorney General of England, William de Grey, stated the Act "does nothing more than facilitate the execution of the [custom's official's] power by making the disobedience of the writ a contempt of court."[54]

After the British government passed this Act, American colonists expressed more dismay with the government's use of writs and general warrants.[55] One citizen said, "our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches . . . ."[56] Another citizen stated, "a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet, and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods."[57] These concerns resonated with colonial judges, because they refused to grant requests for general warrants.[58] Judges refused to grant requests even though the Townshend Act authorized the use of general warrants.

> The nexus between the Townshend Act and the Fourth Amendment is easy to discern. As Professor Davies notes: The memory of Parliament's 1767 reauthorization of general warrants for customs searches of houses was the principal stimulus for the adoption of bans against general

50. Gov't Printing Office, *supra* note 5, at 1200 (quoting Entick v. Carrington, (1765) 95 Eng. Rep. 807, 818 (K.B.)).

51. *Id.* (quoting Entick v. Carrington, (1765) 95 Eng. Rep. 807, 818 (K.B.)).

52. *Id.* (quoting Boyd v. United States, 116 U.S. 616, 626 (1886)).

53. Eldredge, *supra* note 42, at 26 (quoting Tracy Maclin, *Let Sleepoing Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 961 (2002)).

54. *Id.* at 26-27.

55. *See id.* at 26 (quoting NELSON B. LASSON, THE HISTORY & DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 71 (1937).

56. Krent, *supra* note 6, at 59 (quoting Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 602 n.139 (1999)).

57. *Id.* (quoting Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 582 n.83 (1999)).

58. *See id.*

> warrants in the state declarations of rights adopted between 1776 and 1784, and for the anti-Federalist calls for a federal ban against general warrants during the constitutional ratification debates of 1787-88. Indeed, the actions of colonial judges in the Townshend controversy signified the beginnings of a dialogue on the writs and of a consensus against general warrants by the American judiciary. Resistance to the Townshend writs was something more than a local question and with such a widespread legal discussion it is hardly to be wondered if a fourth amendment was proposed for the American Constitution.[59]

When drafting the Constitution our Founding Fathers considered the aforementioned abuses associated with writs and general warrants.[60] James Madison believed "the great mass of the people who opposed [the proposed Constitution] disliked it because it did not contain effectual provisions against the encroachment on particular rights and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power."[61]

B. The Fourth Amendment is Born (1791)

On December 15, 1791, following much debate and drafting, the Fourth Amendment came into effect. The text of 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.[62]

The Fourth Amendment resolved many of the concerns associated with writs and general warrants, because it contained provisions that controlled the federal government's use of search warrants.

C. The Fourth Amendment Applied to the States: Wolf v. Colorado *(1949)*

Prior to 1949, the Fourth Amendment was only applicable to the federal government. Hence, state governments were not required to follow the Fourth Amendment's constitutional requirements for search warrants. However, the Supreme Court's decision in *Wolf v. California* ("*Wolf*")

59. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 961 (2002) (internal citations omitted).

60. *See id.*

61. Eldredge, *supra* note 42, at 27 (quoting NELSON B. LASSON, THE HISTORY & DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 87 (1937)).

62. U.S. CONST. amend. IV.

made the Fourth Amendment applicable to the states through its incorporation into the Fourteenth Amendment's Due Process Clause.[63]

Wolf was a doctor whose practice primarily focused on "the treatment of diseases of women, obstetrics, and pelvic and abdominal surgery."[64] Montgomery was a licensed chiropractor.[65] Believing Wolf and Montgomery were illegally performing abortions, "[r]epresentatives of the district attorney's office . . . went to the office of Wolf without a warrant and took him into custody . . . [the representatives also] took possession [of incriminating evidence used to prosecute Wolf and Montgomery]."[66]

Wolf's case reached the Supreme Court. Justice Frankfurter, author of the Court's majority opinion, wrote, "[t]he security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[67]

III. SEARCH WARRANT REQUIREMENTS

The Fourth Amendment establishes the requirements for issuing a search warrant. First, it must be supported by an oath or affirmation.[68] Second, the search warrant must be issued by a neutral and detached magistrate.[69] Third, it must be based on probable cause.[70] Last, the search warrant must describe with particularity the place to be searched and the persons or things to be seized.[71] The following sub-sections will examine these four constitutional requirements.

A. "No Warrants shall issue . . . [unless] supported by Oath or affirmation*"*

The purpose of the oath or affirmation requirement is to ensure that someone is held accountable for the information contained in the search warrant. The history of this requirement, like the history of the Fourth Amendment, has roots in both England and the colonial United States. "In 1662, Parliament authorized the issuance of general warrants . . . for

63. *See* Wolf v. Colorado, 338 U.S. 25, 27 (1949). *Wolf* was overruled by Mapp v. Ohio, 367 U.S. 643 (1961); however, the *Mapp* Court still recognized the Fourth Amendment was applicable to the states. *Id.* at 654. The *Mapp* Court noted, "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.*

64. Wolf v. State, 187 P.2d 926, 927 (Colo. 1947).

65. *Id.*

66. *Id.* Both Wolf and Montgomery were convicted of conspiracy to commit abortion and sentenced to the state penitentiary for twelve to eighteen months. *Id.* at 926.

67. *Wolf*, 338 U.S. at 27-28.

68. U.S. CONST. amend. IV.

69. *See id.*; Whiteley v Warden, 401 U.S. 560 (1971).

70. U.S. CONST. amend. IV.

71. *Id.*

collecting taxes and enforcing custom laws."[72] In addition, this law required anyone seeking a general warrant to sign an oath.[73] Merely two years later, Parliament deleted the oath requirement.[74]

The writs, which were provided to government officials after 1664, were used to search the homes of American colonists.[75] Moreover, these post-oath writs were used to "search wherever government officials chose with merely absolute and unlimited discretion."[76] The states recognized the importance of having an oath or affirmation. For instance, in 1776, the Pennsylvania Constitution had a provision requiring any warrant to issue upon an oath or affirmation.[77] Interestingly, "[t]he Pennsylvania provision was the basis for the Fourth Amendment to the United States Constitution, which include[s] the oath or affirmation language."[78]

B. Warrants Must be Signed by a Neutral and Detached Magistrate

The requirement that a warrant be issued by a neutral and detached magistrate is not found in the Fourth Amendment.[79] Instead, the Supreme Court developed this requirement.[80] The Court believed that in order to preserve the integrity of both the government and the Fourth Amendment, a search warrant must be issued by a neutral magistrate that was not involved with the underlying case.[81]

The purpose of this requirement is to let a neutral and detached magistrate determine when a search warrant is appropriate. In *Johnson v. United States*, the Supreme Court wrote:

> [T]he point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. [It requires] those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in . . . ferreting out crime.[82]

In effect, the neutral and detached magistrate serves as a protector of the people, whose main job is to limit the police's discretion and abuse of power during the execution of a search warrant.

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72. State v. Tye, 636 N.W.2d 473, 475 (Wis. 2001).
73. *Id.* at 476.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. U.S. CONST. amend. IV.
80. *See generally* Whiteley v Warden, 401 U.S. 560 (1971).
81. *Id.* at 564. ("judicial officer" must issue warrant for either an arrest or a search); Jones v United States, 362 U.S. 257, 270 (1960) ("independent judicial officer" necessary for issuance of warrant).
82. Johnson v. United States, 333 U.S. 10, 13 (1948) (citing United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

The Supreme Court established two tests for determining whether a party has the authority to issue a search warrant. Under the first test, the issuing party must be neutral and detached.[83] The second test requires the issuing party be capable of deciding whether or not probable cause exists for an arrest or search.[84] "The first test cannot be met when the issuing party is himself [or herself] engaged in law enforcement activities . . . [a]nd in passing the second test, the court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause."[85]

C. "No Warrants Shall Issue, but Upon Probable Cause"

The probable cause requirement also has roots in England. General warrants were issued without a determination of probable cause. This made the issuance of these warrants very simple.

The states wanted to end this practice. Virginia was one of the first states that required probable cause be found before a search warrant issued. The Virginia Declaration of Rights, which was adopted in 1776, stated, "'general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence . . . ought not to be granted.'"[86]

This sentiment was also reflected in the Maryland Declaration of Rights, which stated "'[a]ll warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants . . . are illegal, and ought not to be granted.'"[87] Even the North Carolina Declaration of Rights declared, "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."[88] In addition, the Pennsylvania and Massachusetts Constitutions have provisions mandating all warrants be based upon a finding of probable cause.[89]

Probable cause is not defined in the Fourth Amendment.[90] Instead, its definition derived from court interpretation of the amendment. The Supreme Court describes probable cause as "'[t]he facts and circumstances

83. Gov't. Printing Office, *supra* note 5, at 1216-17.

84. *Id.* at 1217.

85. *Id.* at 1216-17.

86. Henry v. United States, 361 U.S. 98, 100 (1959) (quoting Virginia Declaration of Rights (1776), art. X).

87. *Id.* at 101 (quoting Maryland Declaration of Rights (1776), art. XXIII).

88. N.C. CONST. art. I, § 20.

89. *Henry*, 361 U.S. at 101.

90. Gov't. Printing Office, *supra* note 5.

before [an] officer [that would] warrant a man of prudence and caution in believing that the offense has been committed.'"[91]

In deciding whether probable cause exits, courts can use one of two tests: the two-part *Aguilar-Spinelli* test or the "totality of the circumstances" test. Under the *Aguilar-Spinelli* test, the court determines whether a warrant is valid by examining (1) the basis of the informant's knowledge and (2) the veracity of the informant.[92]

In 1983, the Supreme Court abandoned the *Aguilar-Spinelli* test and adopted the "totality of the circumstances" test.[93] Under this test, the veracity and basis of knowledge prongs are not independent. "Instead, they are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."[94]

D. *"No Warrants Shall Issue . . . [unless] Particularly Describing the Place to be Searched, and the Persons or Things to be Seized"*

The particularity provision of the Fourth Amendment requires any search warrant to "particularly describ[e] the place to be searched, and the persons or things to be seized."[95] This provision was enacted to curtail the blanket searches conducted under general warrants. As one Supreme Court Justice noted, "[v]ivid in the memory of the newly independent Americans were those general warrants known as 'writs of assistance' . . . [that] had given custom officials blanket authority to search where they pleased . . . ."[96] The particularity requirement ensures government searches will not develop into the general searches our Founding Fathers despised.

The particularity requirement can be satisfied by cross-referencing or incorporating another document.[97] However, the cross-referencing or incorporation is constitutional only if the warrant itself contains the appropriate words of incorporation.

IV. FEDERAL CIRCUIT SPLIT

The federal courts of appeals are split on whether failure to attach a properly incorporated supporting document to a search warrant violates the Fourth Amendment. This part of the Article will discuss this split by

91. Carroll v. United States, 267 U.S. 132, 161 (1925) (quoting Stacey v. Emery, 267 U.S. 642, 645 (1878)); *see also* Dumbra v. United States, 268 U.S. 435, 441 (1925) (describing probable cause as "such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged.").

92. Spinelli v. United States, 393 U.S. 410, 413 (1969).

93. Illinois v. Gates, 462 U.S. 213, 238 (1983).

94. *Id.* at 233.

95. U.S. CONST. amend. IV.

96. Stanford v. Texas, 379 U.S. 476, 481 (1965).

97. *Groh*, 540 U.S. at 557.

analyzing several decisions addressing this issue. The first portion of this session will discuss three opinions following the majority perspective. The second portion will discuss two decisions adopting the minority perspective.

A. Majority Perspective: The United States Courts of Appeals for the First, Third, Eighth, Ninth, Tenth, and District of Columbia Federal Circuits

The Courts of Appeals for the First, Third, Eighth, Ninth, Tenth, and District of Columbia have concluded that a search warrant's supporting document could satisfy the Fourth Amendment's particularity requirement if the supporting document accompanied the warrant, *and* the warrant used suitable words of reference which incorporated the supporting document.[98] The following sub-sections will examine relevant caselaw from three of these six federal courts of appeals.

1. United States Court of Appeals for the Eighth Circuit: *United States v. Curry* (1990)

a. The Factual Background

On October 6, 1988, police executed a search warrant for Tanell Curry's ("Curry") residence.[99] The purpose of this warrant was to obtain evidence from some robberies that had been committed.[100] During the execution of this search warrant, police discovered illegal narcotics and drug paraphernalia.[101] After observing the illegal narcotics and drug paraphernalia, police obtained another search warrant.[102] The second search warrant led to the discovery of other incriminating items, which included two firearms and over 500 grams of cocaine.[103]

b. The Procedural History

Curry sought to suppress the evidence obtained from execution of both search warrants, as well as a *Franks* Hearing.[104] The magistrate for the United States District of Minnesota recommended Curry's request for a motion to suppress be denied.[105] The magistrate also denied Curry's motion for a *Franks* hearing.[106] The district court judge also denied both of

98. *Bartholomew*, 221 F.3d at 428-29 (emphasis added); *McGrew*, 122 F.3d at 849-50; *Dahlman*, 13 F.3d at 1395; *Dale*, 991 F.2d at 846-47; *Morris*, 977 F.2d at 681 n.3; *Curry*, 911 F.2d at 77.

99. *Curry*, 911 F.2d at 74

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* In *Franks v. Delaware*, the Supreme Court held that, "[w]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment [to the United States Constitution] requires that a hearing be held at the defendant's request." 438 U.S. 154, 155-56 (1978).

105. *Curry*, 911 F.2d at 74.

106. *Id.*

Curry's requests.[107] After the district court judge's ruling, the case was tried and Curry was convicted.[108]

c. A Summation of the Pertinent Portions of the Majority Opinion

First, the court of appeals noted that the Fourth Amendment requires a search warrant to be particular – i.e. describe the place to be searched, and the persons or things to be seized.[109] It then noted the first search warrant did not particularly describe the places to be searched and items to be seized.[110] Instead, "the space for filling in that information was left blank."[111] The government conceded the space was blank; however, it argued the particularity requirement was fulfilled by the supporting affidavit, which provided the address of the residence being searched.[112]

The court recognized that under the traditional rule, a search warrant that lacked particularity could not be cured by a supporting affidavit, because a supporting affidavit was not a part of the warrant itself.[113] However, it did note an exception to the traditional rule. The court wrote that the supporting affidavit could satisfy the Fourth Amendment's particularity requirement if "a) the affidavit accompanies the warrant, *and* b) the warrant uses suitable words of reference which incorporate the affidavit therein."[114] The court then applied this two-part test to the first search warrant.

The court held the government's first warrant failed this test, because it did not contain suitable words of reference that incorporated the supporting affidavit into the warrant itself.[115] It noted that such suitable words of reference included "see attached affidavit" or "as described in the affidavit."[116] Instead of using any of the aforementioned words of reference, this warrant stated, "[w]hereas, the application and supporting affidavit of [Detective] Ross Swanson (was) (were) duly presented and read by the Court, and being fully advised in the premises . . . ."[117]

These words were not suitable words of reference. Thus, the court held the first search warrant was invalid.[118] Because the first warrant was invalid, the court held the second warrant "was also invalid because probable cause from it was based upon information obtained during execution of the first search warrant."[119]

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107. *Id.*
108. *Id.*
109. *Id.* at 76.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 76-77.
114. *Id.* at 77 (emphasis added).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

After finding both search warrants were invalid, the court then discussed whether or not the evidence obtained from the warrants were admissible under the *Leon* exception to the exclusionary rule. In *Leon*, the Supreme Court held the exclusionary rule did not apply to evidence obtained by an officer that acted "in objectively reasonable reliance on a subsequently invalidated search warrant."[120]

As for the first search warrant, the application for the warrant and the supporting affidavit, which were attached the warrant itself, stated the place to be searched was 1209 Devonshire Curve.[121] The warrant itself never contained this information.[122] The magistrate signed the warrant and the supporting affidavit and gave it back to the detective.[123] The magistrate recognized the warrant did not have the place to be searched; however, he thought this was a clerical error on the part of the detective.[124]

The court believed the magistrate should have corrected the address omission, because the magistrate is the final reviewing authority of the warrant.[125] Since "the exclusionary rule [did] not serve to deter the errors of judges, but rather the errors of police officers," the court ruled suppression of evidence derived from the first warrant would not be appropriate.[126] As for the second warrant, the court wrote, "an objectively reasonable officer could have believed the information contained in the affidavit supporting the second search warrant had been lawfully obtained."[127] Thus, evidence obtained from the second search warrant was also admissible under the *Leon* exception.[128]

2. United States Court of Appeals for the Ninth Circuit: *United States v. McGrew* (1997)

a. The Factual Background

In *McGrew*, a magistrate issued a search warrant for the home of Chong Hyon McGrew ("McGrew").[129] The search warrant was based on Drug Enforcement Agent ("DEA") Jonathan Andersen's ("Andersen") belief McGrew was involved in drug trafficking.[130] The warrant itself failed to identify any evidence of criminal activity.[131] However, "[i]n the space provided for that information, the warrant referred the reader to the 'attached affidavit which is incorporated herein.'"[132]

120. *Id.* (discussing United States v. Leon, 468 U.S. 897, 922 (1984)). The *Leon* exception to the exclusionary rule is further discussed in Section VII of this Article.
121. *Id.* at 78.
122. *Id.*
123. *Id*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *McGrew*, 122 F.3d at 848.
130. *Id.*
131. *Id.*
132. *Id.*

After receiving the search warrant, Andersen and other DEA agents executed it and recovered numerous items from McGrew's home.[133] The items recovered included a glass tube with drug residue, cash, notepads, and plastic bags.[134] McGrew was present when the search warrant was executed by Andersen and the DEA agents.[135] However, Andersen did not have the supporting affidavit.[136] Thus, McGrew never saw a copy of the affidavit supporting the search warrant.[137]

b. The Procedural History

McGrew filed a motion to suppress evidence obtained during execution of the search warrant.[138] McGrew argued the search warrant lacked particularity, because the supporting affidavit was not attached to the warrant itself.[139] The district court denied the motion for two reasons.[140] First, it found the supporting affidavit satisfied the Fourth Amendment's particularity requirement.[141] Second, the court reasoned there was no prior precedent requiring officers to attach a supporting affidavit to a search warrant.[142]

c. A Summation of the Pertinent Portions of the Majority Opinion

The Ninth Circuit Court of Appeals reversed the district court's ruling.[143] It noted the lower court's ruling, "contradicts a long line of this circuit's clearly established Fourth Amendment precedent."[144]

The court of appeals began its analysis by discussing some of the purposes of the Fourth Amendment's particularity requirement.[145] It recognized the particularity requirement protects citizens from being subjected to general searches.[146] After discussing this policy, the court examined the warrant used to search McGrew's home.[147] It noted the warrant itself did not satisfy the particularity requirement, because it did not describe the items to be seized or the crime being investigated.[148] Instead, "[t]he warrant only referred to an 'attached affidavit which is incorporated herein.'"[149] The court expressed concern with the government's failure to

133. *Id.*
134. *Id.*
135. *Id.* at 849.
136. *See id.* at 848-49.
137. *Id.* at 849.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 850.
144. *Id.* at 849.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

show if the supporting affidavit was even attached to the search warrant.[150] Additionally, the court was concerned with the government's inability to prove if the warrant and supporting affidavit were present during the search.[151]

The court acknowledged a "search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, *and* (2) the warrant uses suitable words of reference which incorporate the affidavit therein."[152] According to the court, this two-part test served two very important purposes.[153] First, attaching the supporting document to the search warrant limits the executing officer's discretion.[154] Second, attaching the supporting document to the search warrant ensures the person being searched has notice of what items can be seized.[155]

In the court's opinion, the second goal was not met because McGrew never saw a copy of the supporting affidavit.[156] Moreover, the court wrote the first goal was probably unsatisfied because the supporting document never accompanied the search warrant.[157]

The court also rejected the government's argument that it could refuse to produce a supporting document in order to protect confidential information or witnesses.[158] The court stated, the government must particularly list the items to be seized in the warrant itself, if it chose to keep an affidavit or supporting document under seal.[159] The court further wrote, "[i]t is the government's duty to serve the search warrant on the suspect, and the warrant must contain, either on its face or by attachment, a sufficiently particular description of what is to be seized."[160]

The court also found the *Leon* exception did not apply to this search warrant.[161] It ruled there could not be an objective reasonable basis for believing that the warrant was valid, because the supporting affidavit was not attached to the warrant itself.[162] Thus, "[i]f the 'incorporated' affidavit [did] not accompany the warrant, agents [could not] claim good faith reliance on the affidavit's contents."[163]

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150. *Id.*
151. *Id.*
152. *Id.* (emphasis added).
153. *Id.* at 850.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *See id.*
162. *Id.*
163. *Id.* The *McGrew* court also noted "the good faith exception is not available because (1) the requirement of attaching affidavits to general warrants has been the clear law of this circuit for over a decade, foreclosing any 'reasonable belief' to the contrary; and (2) no matter how aware the officers are of the limits of their search, the person being searched (the second aim of the rule) is still completely unaided when agents fail to produce a document explaining the parameters of the search." *Id.* at 850 n.5.

3. United States Court of Appeals for the Third Circuit: *Bartholomew v. Pennsylvania* (2000)

a. The Factual Background

In 1994, the Pennsylvania Office of the Attorney General received information that Gene and Robin Bartholomew ("Bartholomews") were participating in criminal acts.[164] In 1995, an agent of the Pennsylvania Attorney General's office applied for warrants to search two properties owned by the Bartholomews.[165] When he applied for the search warrants the agent provided the judge with two exhibits.[166]

The first exhibit ("Exhibit A") contained a list of items the agent expected to seize during execution of the search warrants.[167] The second exhibit ("Exhibit B") consisted of a forty-nine page affidavit describing the agent's probable cause for believing the Bartholomews were engaged in criminal acts.[168] The judge issued the search warrants.[169] In addition, the judge also placed Exhibit A and Exhibit B under seal.[170]

The search warrants were executed on September 11, 1995.[171] "The Bartholomews were given an inventory of the items seized but were not given Exhibit A, the list of items to be seized."[172] Exhibit A and Exhibit B were unsealed subsequent to the search of the Bartholomew's property.[173]

b. The Procedural History

In November 1995, the Bartholomews sought the return of their property.[174] The judge ruled the search warrants used to take the Bartholomews' property were invalid.[175] He held the warrants "were unlawful because they neither named nor described with particularity the property to be seized and the list of items to be seized was sealed."[176]

Nearly two years later, the Bartholomews filed a complaint against one of the agents who executed the search warrants.[177] They alleged "that probable cause did not exist and that because the affidavit and the list of

164. *Bartholomew*, 221 F.3d at 426.

165. *Id.* The Bartholomews owned two separate properties, both of which were searched. They owned a retail and music store called "Toones," as well as a home. *Id.*

166. *Id.* at 426-27.

167. *Id.* at 427.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* Exhibit A was unsealed one week after the searches and Exhibit B was unsealed four months after the searches. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* No criminal charges were filed against the couple. *Id.*

177. *Id.*

items to be seized were sealed, the warrants deprived [them] of their right to be free from unreasonable searches and seizures."[178]

The district court granted the agent's motion for summary judgment for all of his claims except one.[179] It found the agent acted against a "clearly established constitutional right" when he executed a search warrant that did not describe with particularity the items to be seized.[180] The agent appealed the district court's ruling.[181]

c. A Summation of the Pertinent Portions of the Majority Opinion

The court of appeals analysis began with a reference to the actual text of the Fourth Amendment.[182] The court noted that the Fourth Amendment "protects 'the right of people to be secure . . . against unreasonable searches and seizures.'"[183] The court then noted the warrant itself must "particularly describe[e] the place to be searched, and the persons or things to be seized."[184] The warrant must be particular, because – as the court recognized – particularity stops police from conducting general and discretionary searches.[185]

In the Third Circuit, "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."[186] The court stated the purpose of this rule is to limit the executing agent's discretion during the search.[187] In addition, the court also recognized another purpose of the rule is to provide the target of the search with notice of the items being seized.[188]

In this case, the search warrant properly incorporated Exhibit A – the list of items to be seized.[189] However, the court stated the supporting document was not attached to the warrant, but placed under seal.[190] In reiterating rationales of the *McGrew* court, the court informed the government that, "'[i]f [it] wishes to keep an affidavit under seal . . . it must list the items it seeks with particularity in the warrant itself.'"[191] It further stated the government had an obligation to provide the suspect with a copy of the search warrant that particularly describes, "on its face or by attachment," what items are to be seized.[192]

178. *Id.* The Bartholomews filed a complaint against the agents under 42 U.S.C. § 1983 and § 1985. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 428.

183. *Id.* (quoting Kornegay v. Cottingham, 120 F.3d 392, 396 (3d Cir. 1997)).

184. *Id.* (quoting U.S. CONST. amend. IV.).

185. *Id.*

186. *Id.*

187. *Id.* at 429.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (quoting United States v. McGrew, 122 F.3d 847, 850 (9th Cir. 1997) (alteration to the original in the quoted text).

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

The court also disagreed with the district court's decision that the agent violated a "clearly established constitutional right."[193] It recognized that the courts and federal Constitution clearly established that a warrant must be particular; however, the courts nor the Constitution have clearly established "whether . . . one has a constitutional right to be free from a search pursuant to a warrant based upon a sealed list of items to be seized."[194]

d. Minority Perspective: The United States Courts of Appeals for the Fourth, Sixth, and Eleventh Federal Circuits

The Fourth, Sixth, and Eleventh federal circuits have concluded that a search warrant's supporting document could satisfy the Fourth Amendment's particularity requirement by *either* referencing the supporting document or having the supporting document attached to the warrant itself.[195] The following sub-sections will examine relevant caselaw from two of these federal circuits.

4. United States Court of Appeals for the Sixth Circuit: *United States v. Baranski* (2006)

a. The Factual Background

Keith Baranski ("Baranski") was a licensed firearms dealer.[196] He imported firearms from Europe and stored them in a warehouse.[197] These firearms were stored in a warehouse because federal law mandated Baranski possess the firearms until they were sold to law enforcement departments.[198]

However, instead of selling the firearms to law enforcement departments, Baranski sold them illegally.[199] Michael Johnson ("Johnson"), an agent with the Bureau of Alcohol, Tobacco and Firearms ("BATF") discovered Baranski's illegal activity.[200] Thus, on April 10, 2001, Johnson applied for a search warrant for the Pars warehouse, the place Baranski kept the firearms.[201]

While applying for the search warrant, Baranski prepared an affidavit providing probable cause for the search, as well as identifying the place to be searched and the items to be seized.[202] The warrant itself did not particularly describe the items to be seized or place to be searched.[203] Instead,

193. *Id.* at 429.
194. *Id.*
195. *See Baranski*, 452 F.3d at 440 (emphasis added); *Hurwitz*, 459 F.3d at 471; *Wuagneux*, 683 F.2d at 1351 n.6.
196. *Baranski*, 452 F.3d at 436.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

the warrant stated "See Attached Affidavit," which was a reference to Johnson's prepared supporting affidavit.[204] A magistrate granted Johnson's search warrant request.[205] In addition, the magistrate sealed the supporting affidavit to protect the BATF's confidential informants.[206]

Johnson executed the search warrant on April 11, 2001.[207] The attorney for Pars, Saeid Shafizadeh ("Shafizadeh"), was present at the warehouse during the warrant's execution.[208] BATF agents provided Shafizadeh with a copy of the search warrant, but not the supporting affidavit.[209] The agents told Shafizadeh the supporting affidavit was placed under seal.[210]

BATF agents commenced a search of the warehouse.[211] As a result of the search, the agents uncovered 372 machine guns and twelve crates of firearm accessories.[212] They left a copy of the search warrant and inventory of seized firearms with Shafizadeh.[213]

b. The Procedural History

On July 5, 2001, both Baranski and Pars filed a *Bivens* money-damages action against the BATF agents.[214] They claimed the agents violated their Fourth Amendment rights.[215] In addition, Baranski and Pars sought to unseal the supporting affidavit.[216] On March 22, 2002, the district court stayed the *Bivens* claim until Baranski's criminal investigation ended.[217] The court also rejected the request to unseal the supporting affidavit.[218]

On July 3, 2002, a grand jury indicted Baranski "for making 'a false entry on any application, return, or record required by [the firearm importation laws], knowing such entry to be false.'"[219] The grand jury also attempted to forfeit the seized firearms and evidence obtained from the search warrant.[220] Baranski filed a motion to suppress evidence obtained

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 437.
212. *Id.*
213. *Id.*
214. *Id.*; *see also* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971) (holding that monetary damages are available to individuals when government agents violate their constitutional rights).
215. *Baranski*, 452 F.3d at 437.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* (quoting 26 U.S.C. § 5861(I) (2002)). More specifically, Baranski was indicted for violating 26 U.S.C. § 5861(l), which stated: "It shall be unlawful for any person - (I) to make, or cause the making of, a false entry on any application, return, or record required by this chapter [26 USCS §§ 5801 et seq.], knowing such entry to be false."
220. *Id.*

from the search warrant.[221] However, his motion to suppress was denied by the district court.[222]

In November 2002, Baranski was found guilty and sentenced to sixty months imprisonment.[223] After his trial, the district court lifted the stay on his *Bivens* claim.[224] On March 14, 2003, the district court found the agents were subject to qualified immunity, because the search did not violate the Fourth Amendment.[225] Exactly two years later, a panel of the Sixth Circuit Court of Appeals reversed the district court's ruling.[226]

The panel's decision was based on the Supreme Court's ruling in *Groh*.[227] The panel wrote, "the warrant was facially deficient because the affidavit referenced in the warrant and describing the items to be seized was under seal and was not attached to the warrant when the search was conducted."[228] On August 5, 2005, the full Sixth Circuit Court of Appeals vacated the panel's decision and reheard the case.[229]

c. *A Summation of the Pertinent Portions of the Majority Opinion*

The court first asked whether the BATF agents were required to get a search warrant before searching the Pars warehouse.[230] Both the government and Baranski agreed the Fourth Amendment's Warrant Clause applied to this specific search.[231]

Next, the court asked whether this search warrant satisfied the Warrant Clause when the "warrant itself did not describe with particularity the items to be seized but expressly incorporated an affidavit that did describe them."[232] It noted BATF agents presented two items to the neutral and detached magistrate.[233] The first item was the warrant itself.[234] The second item was the supporting affidavit.[235] On the portion of the warrant requesting the items to be seized, Johnson wrote "See Attached Affidavit," which identified the items that could be seized.[236]

The court believed this was proper incorporation under its prior precedence, as well as the Supreme Court's decision in *Groh*.[237] It noted that in

221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*; Groh v. Ramirez, 540 U.S. 551 (2004).
228. *Baranski*, 452 F.3d at 437-38.
229. *Id.* at 438.
230. *Id.* at 438-39.
231. *Id.* at 439.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 440.

Groh, the Supreme Court held a search warrant could cross-reference supporting documents.[238] After making this observation, the court discussed the reasons *Groh* was inapplicable to Baranski's case.[239] It stated that the search warrant in *Groh* completely failed to incorporate the supporting affidavit.[240] In addition, the *Groh* warrant failed to identify the items police could seize.[241]

Unlike the warrant in *Groh*, this search warrant incorporated the supporting affidavit, was signed by a magistrate, and described the items being seized.[242] For these reasons, the court held the warrant was constitutionally valid.[243]

The court of appeals also discussed whether the warrant should have been presented to Baranski prior to the search.[244] Baranski argued that the *Groh* decision established a rule that the supporting affidavit must be given to the property owner.[245] The court disagreed with Baranski's interpretation of *Groh*.[246] It noted that in *Groh*, the Supreme Court acknowledged that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure require police to present a warrant before commencing a search.[247]

5. United States Court of Appeals for the Fourth Circuit: *United States v. Hurwitz* (2006)

a. The Factual Background

Dr. William E. Hurwitz ("Hurwitz") was a doctor who specialized in the treatment of pain.[248] Hurwitz's practice required him to prescribe many controlled substances, such as methadone, oxycodone, and hydromorphone.[249] In 2002, federal agents learned some of his patients had been arrested for trying to sell prescription drugs.[250] Hurwitz's patients told federal investigators that Hurwitz supplied them with the medications.[251] In response to this information, Hurwitz was indicted on federal

238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 439-40.
242. *Id.* at 440.
243. *Id.* at 450.
244. *Id.* at 441-42.
245. *Id.* at 442.
246. *Id.* at 443.
247. *Id.*
248. United States v. Hurwitz, 459 F.3d 463, 466 (4th Cir. 2006).
249. *Id.*
250. *Id.*
251. *Id.* at 466-67.

drug charges.[252] He was convicted and sentenced to twenty-five years imprisonment.[253]

b. The Procedural History

Prior to Hurwitz's trial, federal agents executed search warrants from his home and business.[254] The warrants were supported by the affidavit of Agent Fulton S. Lucas ("Lucas").[255] Lucas's affidavit stated that local law enforcement agencies reported "an unusually high incident of arrests of individuals for distributing prescription narcotics in the Northern and Southwest region of the state of Virginia, and rural areas of West Virginia and Tennessee."[256] Lucas also noted that information obtained from the arrest of these individuals showed that the person responsible for prescribing the medication was Hurwitz.[257]

On the portion of the search warrant application that asked the agent to "describe the person or property to be seized," Lucas wrote "See Attachment A of Affidavit."[258] Lucas's supporting attachment listed the specific items the government sought to seize.[259]

The magistrate issued the warrant.[260] In addition, Lucas's warrant application and supporting affidavit were placed under seal.[261] The warrant itself did not particularly describe the items sought or person to be seized.[262] Instead, "in the space reserved for a description of the items to be seized – the words "See Attachment" had been entered."[263]

c. A Summation of the Pertinent Portions of the Majority Opinion

Hurwitz argued that the court should adopt the majority perspective.[264] His rationale for this argument was based on the *Groh* decision.[265] In response, the court noted that *Groh* did not establish a rule for warrant incorporation.[266] "Instead[,] *Groh* simply acknowledge[d] the approach generally followed by the Courts of Appeals."[267]

252. *Id.* at 467. Hurwitz was indicted on one count of conspiracy to engage in drug trafficking, one count of engaging in a continuing criminal enterprise, two counts of healthcare fraud, and fifty-eight counts of drug trafficking.

253. *Id.* at 469. "The jury acquitted Hurwitz of six counts of drug trafficking, as well as one count of engaging in a continuing criminal enterprise and two counts of healthcare fraud. The jury failed to reach a decision on the remaining drug trafficking counts." *Id.* at 468-69.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 471.

265. *Id.*

266. *Id.*

267. *Id.*

The court recognized that a majority of federal courts of appeals required a search warrant to reference the supporting document *and* have the supporting document attached to the warrant itself.[268] However, as the court ruled, the Fourth Circuit only requires that the search warrant either properly reference the supporting document *or* the supporting document be attached to the search warrant.[269] In this case, the search warrant was valid because it properly incorporated the supporting affidavit.[270]

The court also addressed Hurwitz's argument that the Fourth Amendment required the supporting affidavit be attached to the warrant itself.[271] The court disagreed with this argument.[272] It noted the Fourth Amendment does not require the executing official to provide a copy of the warrant before executing it.[273] "In fact, the Fourth Amendment is not offended where the executing officer fails to leave a copy of the search warrant with the property owner following the search, or fails even to carry the warrant during the search."[274]

Moreover, the court believed the purpose of the particularity requirement did not include allowing citizens to monitor government searches of their homes and property.[275] It also recognized the search warrant did not need to be present during the search, because the Fourth Amendment did not support citizens "'engag[ing] the police in a debate' about the warrant."[276]

V. *GROH V. RAMIREZ*: THE SUPREME COURT RECOGNIZES THE ISSUE, BUT DOES NOT ADDRESS IT.

This section will explore the Supreme Court's decision in *Groh v. Ramirez*. This section will extensively focus on the facts of the case, as well as the Court's majority opinion.

A. The Factual Background

In February 1997, Jeff Groh ("Groh") learned that Joseph Ramirez ("Ramirez") kept a large amount of firearms at his ranch.[277] These firearms included an automatic rifle, grenades, grenade launcher, and rocket launcher.[278] Groh submitted an application for a warrant to search Ramirez's ranch.[279] Groh's search warrant application stated the purpose of the

268. *Id.* (emphasis added).
269. *Id.* (emphasis added).
270. *Id.* at 472.
271. *Id.*
272. *Id.*
273. *See id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Groh*, 540 U.S. at 554.
278. *Id.* Possession of these unregistered items violated several federal laws: 18 U.S.C. § 922(o)(1) and 26 U.S.C. § 5861.
279. *Id.*

search was for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."[280]

When Groh submitted the search warrant application he also provided a supporting affidavit.[281] This supporting affidavit described Groh's belief that Ramirez had illegal contraband on the property.[282] Both the search warrant application and supporting affidavit were presented to the court magistrate.[283] The magistrate issued the search warrant.[284]

The search warrant's application particularly described the place to be searched, as well as the contraband Groh would seize.[285] However, the warrant itself was not particular.[286] In fact, "it failed to identify any of the items that [the] petitioner intended to seize."[287] The section of the warrant seeking a description of the person or items to be seized merely provided a description of Ramirez's home.[288] Additionally, Groh's warrant did not incorporate, by reference, the items listed in the search warrant application.[289]

The search warrant was executed a day after the magistrate allowed it.[290] According to Ramirez's wife, who was present during execution of the warrant, Groh stated he was looking for "an explosive device in a box."[291] Groh said he "described the objects of the search to Mrs. Ramirez in person and to Mr. Ramirez by telephone."[292] The search resulted in the recovery of no weapons.[293]

After finishing the search, Groh gave Ramirez's wife a copy of the search warrant.[294] However, Groh did not give Mrs. Ramirez a copy of the search warrant's application, because it was placed under seal.[295] The day after the search, Groh faxed the Ramirezes attorney a copy of the part of the search warrant's application listing the things to be seized.[296]

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280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 554-55.
290. *Id.* at 555.
291. *Id.*
292. *Id.*
293. *Id.* Hence, no criminal charges issued against the Ramirezes.
294. *Id.*
295. *Id.*
296. *Id.*

B. *The Procedural History*

The Ramirezes sued Groh under *Bivens* and 42 U.S.C. § 1983.[297] They raised eight separate claims, which included a violation of the Fourth Amendment.[298] The District Court for the District of Montana entered summary judgment and held "the warrant [was] sufficiently detailed if the executing officers [could] locate the correct house."[299] In addition, the court ruled "the failure of the warrant to describe the objects of the search amounted to a mere 'typographical error.'"[300]

The district court's decision was almost entirely affirmed by the Ninth Circuit Court of Appeals.[301] The court of appeals did not agree with the district court's decision regarding the Ramirezes' Fourth Amendment claim.[302] More specifically, the court of appeals held, "the warrant was invalid because it did not 'describe with particularity the place to be searched and the items to be seized,' and [the] oral statements by [Groh] during or after the search could not cure the omission."[303] In addition, it noted the search warrant's lack of particularity increased the chances of confrontation between the Ramirezes and the police.[304] Moreover, the court of appeals believed the warrant's lack of particularity also "deprived respondents of the means 'to challenge officers who might have exceeded the limits imposed by the magistrate.'"[305] The Supreme Court granted certiorari and affirmed the opinion of the court of appeals.[306]

C. *An Analysis of the Pertinent Portions of Justice Steven's Majority Opinion*

The Court began its analysis by noting the Fourth Amendment states "no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized.*"[307] The Court noted that Groh's search warrant satisfied three of these requirements, because it was based on probable cause, supported by a sworn affidavit, and described the place to be searched.[308] However, the warrant did not particularly describe the items to being seized.[309]

Instead, the search warrant's application described the things to be seized.[310] Nevertheless, the Court stated the plain text of the Fourth

297. *Id.* The Ramirezes also sued the other federal agents participating in the search.
298. *Id.*
299. *Id.* at 555-56.
300. *Id.* at 556.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 557.
308. *Id.*
309. *Id.*
310. *Id.*

Amendment required particularity in the search warrant itself and not the documents supporting the warrant.[311] More specifically, the Court wrote, "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not the supporting documents."[312]

The Court did recognize the Fourth Amendment allowed search warrants to cross-reference other documents.[313] It wrote, "[i]ndeed, 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."[314] However, the Court refused to further discuss the issue of incorporation, because Groh's search warrant did not incorporate the supporting affidavit; and because, the supporting affidavit was not attached to the warrant itself.[315]

The *Groh* decision does not shed much light on the issue of incorporation. To make things more confusing, the Court provides an indication it would adopt either the majority or minority perspectives.[316] For instance, when the court discussed the rule of incorporation it used the rule established by courts following the majority perspective. However, it also stated, "'[t]he presence of a search warrant serves a high function' . . . and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search . . . ."[317] Hence, the Court is saying that attaching a supporting document to the warrant itself may be enough to satisfy the Fourth Amendment's particularity requirement.[318] This is a notion that is prominent in courts following the minority perspective. The Court may also be indicating that words of incorporation are superfluous to the Fourth Amendment's particularity requirement.[319]

VI. ANALYSIS: A PLAIN MEANING AND POLICY ORIENTED APPROACH

This section will advocate for adoption of the majority perspective by discussing the plain language of the Fourth Amendment, the public policies underlying the Fourth Amendment, and the reasons these policies support adoption of the majority perspective.

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.* at 557-58 (emphasis added).
315. *Id.* at 558.
316. *Id.*
317. *Id.* at 557.
318. *Id.*
319. *Id.*

A. *Plain-meaning*

Under a plain-meaning analysis, the Fourth Amendment requires the warrant itself, and not the supporting document, to describe the place to be searched and persons or things to be seized. If federal courts followed the plain-meaning approach to search warrant incorporation, then incorporation would not be an issue. Under a plain-meaning analysis there would not be a need to examine a supporting document, because all constitutional requirements would have to be contained on the warrant itself.

Neither the Supreme Court nor the federal courts of appeals have taken this rigid interpretation of the Fourth Amendment. In fact, the Supreme Court has acknowledged that the Fourth Amendment does not prohibit a search warrant from referencing a supporting document.[320] It has even acknowledged that most courts of appeals interpret a search warrant with reference to a supporting document if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.[321] However, this does not answer whether or not the Fourth Amendment requires the supporting document to be attached to the search warrant during its execution.

The Court's recognition of incorporation is not surprising especially considering the problems that could arise from requiring law enforcement officials to place every bit of information on the warrant itself. For instance, search warrants are typically written or typed on a single sheet of paper. Requiring law enforcement officers to put all information within the confines of the single page could overload the warrant with text, in effect making the warrant unreadable.

Pragmatically, the idea of incorporation also makes sense, because it allows the warrant applicant to provide as much information as possible to the magistrate. For example, supplemental documents allow warrant applicants to provide magistrates with information that could not otherwise fit within the borders of the search warrant page. This excess information results in the magistrate being more capable of assessing whether or not to grant the search warrant request.

Overall, the courts have recognized the vital role incorporation plays in Fourth Amendment interpretation. After considering the Supreme Court's statements, as well as the plain-language of the Fourth Amendment, the question becomes whether the particularity requirement is satisfied by either incorporation into the search warrant or incorporation and physical attachment to the search warrant.

320. *Id.*
321. *Id.*

B. Fourth Amendment Public Policies

When analyzing the issue of search warrant incorporation, one must remember the history and public policies underlying the Fourth Amendment. Hence, this means analyzing more than the plain words or text of the Fourth Amendment.

The following subsections will discuss some of the main policies underlying the Fourth Amendment. In addition, these subsections will explain the reasons these policies support adoption of the majority perspective. Many of these policies are based on the same arguments. However, this does not negate the fact that they each individually, and as a whole, support adoption of the majority perspective of search warrant incorporation.

1. Mandating Attachment of the Supporting Document

a. Assuring Citizens the Executing Officer has Lawful Authority to Search and Seize Property

The government should only use a search warrant when it has the lawful authority to search and seize property. This means having a fully completed warrant attached to any properly incorporated supporting document. In other words, in order for the search warrant to be lawful, the warrant – i.e. a warrant that contains probable cause, supported by oath or affirmation, issued by a neutral and detached magistrate and particularly describing the place to be searched, and the persons or things to be seized – must be completed upon execution of the search.

The government's search is viewed as an act of lawful authority if a citizen is able to see the specific reasons for the government's presence. Additionally, this view of lawful authority is furthered since the citizen can see the government is conducting the search within the proper framework of the Fourth Amendment. Lawful authority is negated when the document that directly states the search warrant's purpose is not present during warrant's execution.

When the police execute a search warrant that does not have any inclination of the place to be searched and the persons or things to be seized, citizens can be left dumbfounded as to the government's reason for being on their property. Hence, as our Supreme Court noted, this policy "is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection."[322] Moreover, as one court noted, "the purpose of handing the occupant . . . the [search] warrant . . . is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate."[323]

322. *Id.*

323. United States v. Stefonek, 179 F.3d 1030, 1035 (7th Cir. 1999).

b. Limiting the Government's Discretion During Execution of the Search Warrant

In addition to informing citizens about the parameters of the government's search warrant, the particularity requirement also informs executing officers about the parameters of it. This policy comes into effect when the search warrant applicant is not present for the execution of the warrant or execution of the warrant requires the use of several officers.

Many problems can arise when both the search warrant's applicant and the warrant's properly incorporated supporting document are not present when the warrant is executed. For instance, the officer executing the warrant would not know the parameters of the search, because the document providing the parameters of the search would not be present during the search. These are problems that could be avoided by attaching the supporting document to the search warrant.

These same problems arise when several officers are executing a search warrant. Arguably, an officer could orally inform other officers about the place to be searched and persons or things to be seized. However, oral notification could result in the misinterpretation or confusion about the search. Practically, having the warrant itself, as well as the properly incorporated supporting document, would reduce any misinterpretation or confusion that could arise during the search warrant's execution.

c. Probable Cause for the Search Warrant

"The chief purpose of the particularity requirement [is] to prevent general searches by requiring a neutral judicial officer to cabin the scope of the search to those areas and items for which there exist probable cause that a crime has been committed."[324] The neutral and detached magistrate examines numerous documents before issuing a search warrant. In fact, some of these items, such as the affidavit in support of the search warrant, contain the probable cause needed to issue the search warrant. The search warrant would not issue if these supporting documents were not presented to the neutral and detached magistrate. Recognizing this, it only makes sense that all documents used to satisfy the Fourth Amendment's search warrant requirements are attached to the warrant itself when the warrant is executed.

d. Giving Notice to the Person Subject to the Search

Another purpose of the Fourth Amendment's particularity requirement is to give the property owner notice of the place to be searched and persons or things to be seized. Notice cannot be given when the supporting document, which contains these descriptions, is not attached to the warrant. In effect, the government is conducting general searches when it keeps the search warrant's supporting document under seal. In fact, when the supporting document is kept under seal, there is no way the subject of

324. *See Baranski*, 452 F.3d at 441.

the search can challenge the parameters of the search prior to the warrant's execution. Hence, by not providing the subject of the search with notice, the government could perform searches limitless in nature.

e. Protecting Citizens Interest in Monitoring the Search

Citizens maintain an interest in monitoring searches even though the application and issuance of the search warrant is a government initiated process. Our Founding Fathers even agreed with this notion. For instance, they greatly disapproved of colonists' inability to question the purpose or scope of general warrants.

This monitoring function is best achieved by allowing a citizen to have the completed search warrant at the time of the search. Having the completed warrant gives the citizen a mechanism for monitoring the search and making sure the government's actions are coinciding with what is on the search warrant. Moreover, this policy reinforces the notion that people should "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ."[325]

f. Avoiding General Searches

"The particularity requirement is intended 'to prevent the police from undertaking a general exploratory rummaging through a person's belongings.'"[326] As previously mentioned, general warrants gave the government free-range and unbridled discretion to search anyplace or anything at anytime. A primary reason the Fourth Amendment was adopted was to end this type of general rummaging conducted by the government. Curtailing general exploratory searches is difficult, especially when the document that identifies the parameters of the search warrant is not present during the warrant's execution.[327]

2. Mandating Words of Reference on the Search Warrant

The neutral and detached magistrate must have notice of all documents being used to get the warrant issued and in turn, access to the place to be searched and items or things to be seized. By writing words of reference, such as *see attached affidavit* or *as described in the affidavit*, on the warrant itself, a magistrate knows that additional information is necessary to issuance of the warrant. In addition, before a search warrant can incorporate a supporting document, the warrant must state which documents are being incorporated. The magistrate should not have to assume that all papers presented to them are relevant to issuance of the warrant. Instead, the

325. U.S. CONST. amend. IV.

326. *Bartholomew*, 221 F.3d at 428.

327. Another policy to consider would be judicial economy. The criminal courts are extremely backlogged with cases. The dockets are filed with trials, pre-trials, motions for discovery, motions to suppress, and arraignments – to name a few. Specifically, motions to suppress take a lot of time and effort. This time and effort is increased when the defense attorney does not have a complete search warrant. Thus, instead of filing a motion to suppress, the attorney would have to file a motion to unseal the affidavit or supporting document. In effect, adding another motion to the judicial docket.

search warrant applicant should clearly delineate – in the warrant itself – those supporting documents that are relevant to its issuance, as well as those supporting documents it wishes to incorporate into the warrant.

VII. APPLYING THE *LEON* EXCEPTION TO THE EXCLUSIONARY RULE

This section of the Article will discuss whether the *Leon* exception to the exclusionary rule should apply when: 1) the search warrant properly incorporates the supporting document and the supporting document is attached to the warrant; 2) the search warrant properly incorporates the supporting document but the supporting document is not attached to the warrant; 3) the search warrant does not properly incorporate the supporting document and the supporting document is not attached to the warrant; and 4) the search warrant does not properly incorporate the supporting document but the supporting document is attached to the warrant.

A. United States v. Leon

In *United States v. Leon*, the Supreme Court held the exclusionary rule is inapplicable when an officer acts in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate.[328] Hence, if a police officer or executing official relies, in good faith, on an invalid search warrant, any evidence obtained from the use of that warrant can be used against the defendant.

B. Applying Leon

1. The Search Warrant Properly Incorporates the Supporting Document and the Supporting Document is Attached to the Warrant

This type of search warrant is valid under both the minority and majority perspective. In addition, these warrants are valid under the federal Constitution. Thus, *Leon* would not be applicable to these types of warrants.

2. The Search Warrant Properly Incorporates the Supporting Document but the Supporting Document is not Attached to the Warrant

The *Leon* exception *should not* apply to situations where the search warrant incorporates the supporting document, but the document is not attached to the warrant. In this situation, a warrant that incorporates another document, but is not attached to that document would be "so facially deficient . . . that the executing [officer] cannot reasonably presume it to be valid."[329]

The Constitution and prior court precedence provides executing officers' notice that a search warrant must be supported by an oath or affirmation, issued by a neutral and detached magistrate, based on probable

328. United States v. Leon, 468 U.S. 897 (1984).
329. *Id.* at 923.

cause, and describe with particularity the place to be searched and persons or things to be seized. If one of these requirements is omitted from the warrant, the police or executing official cannot claim to have relied on the warrant in good faith. Moreover, an officer cannot have reasonably relied on a search warrant when the portion of the warrant providing the items to be seized is not attached to the warrant.

3. The Search Warrant Does Not Properly Incorporate the Supporting Document and the Supporting Document is not Attached to the Warrant

The *Leon* exception *should not* apply to situations where the search warrant does not properly incorporate the supporting document and the supporting document is not attached to the warrant. In this situation, the warrant is completely invalid and no officer can have relied on the warrant in good faith. This type of search warrant does not meet any of the requirements of incorporation under either the majority or minority perspectives.

4. The Search Warrant Does Not Properly Incorporate the Supporting Document but the Supporting Document is Attached to the Warrant

The *Leon* exception *should* apply to situations where the search warrant has not properly incorporated the supporting document, but the supporting document is attached to the warrant. In this case, the police could reasonably believe that the warrant was valid.

The issue would be whether it is reasonable to rely on a warrant that improperly incorporates a supporting document, even when that supporting document is attached to the warrant. It may be reasonable if the search warrant uses incorrect words of incorporation. Since the supporting document is attached to the search warrant the police could reasonably infer the warrant correctly incorporated that document. Most importantly, the police would have the document that informs them of the place to be searched, and the persons or things to be seized.

VIII. CONCLUSION

Our federal Constitution requires search warrants meet specific requirements. It must be supported by an oath or affirmation; issued by a neutral and detached magistrate; based on probable cause to believe that persons or things to be seized will be found in the place to be searched; and describe with particularity the place to be searched and the persons or things to be seized. Instead of allowing police to execute warrants that reference documents located in places unknown, courts should require police to attach correctly referenced documents to the search warrant. This not only maintains credibility within the law enforcement agency, but also reinforces the public policies ingrained in the Fourth Amendment to the United States Constitution.