

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:CT-112064-04
EEBoody/MENeedle

MAR 19 2004

date: March 19, 2004

to: Chief, Criminal Investigation

from: 
Edward F. Cronin, Division Counsel/Associate Chief Counsel (Criminal Tax)

subject: *Groh v. Ramirez (Ramirez)*—Supreme Court Holds Flawed Search Warrant Invalid.

In *Groh v. Ramirez*, 124 S. Ct. 1284 (February 24, 2004) (copy attached), the U.S. Supreme Court held by a 7 to 2 majority that a search warrant that failed to describe the persons or things to be seized was invalid on its face, notwithstanding that the requisite particularized description was provided in the unincorporated search warrant application. By a slim 5 to 4 majority, the Court also ruled that the federal agent who had prepared the search warrant and supervised its execution was not entitled to qualified immunity from liability. This decision, along with the Ninth Circuit's recent decision in *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003) (copy attached), clearly highlight the need for a warrant to contain on its face sufficient information to instruct both the executing officer as well as the occupant of the place to be searched of the nature of the alleged violation(s) and a description of the items to be seized. Accordingly, increased attention must be paid to the actual search warrant to ensure that there are no deficiencies in the document.

BACKGROUND

Procedure:

Rule 41 of the Federal Rules of Criminal Procedure sets forth the procedures for obtaining a search warrant. Pursuant to Rule 41(d), a search warrant application is submitted to a magistrate judge along with an affidavit establishing probable cause to search for and seize property which evidences a crime. After finding probable cause, a magistrate judge will issue the actual court order authorizing the search (the warrant). Rule 41(e)(1). Rule 41(e)(2) further provides that the warrant must identify the property to be searched as well as the items to be seized. Thus, the warrant must instruct the ~~executing officer where to go, why they are there (what crimes have been committed),~~

PMTA : 00650

CC:CT-112064-04

and what to look for. According to Rule 41(f)(3), the executing officer must also provide the occupant of the property with a copy of the warrant which describes the place to be searched, the alleged violations, and the items to be seized. One way to accomplish this is to include the information in an affidavit which is incorporated by reference and attached to the warrant. Affidavits which are sealed and not given to the occupant can not be considered in determining whether the requirements of Rule 41 have been satisfied.

Groh v. Ramirez

Facts:

Based on information received from a "concerned citizen," Groh, a veteran Bureau of Alcohol, Tobacco, and Firearms special agent, submitted an application for a warrant to search the Ramirez's large ranch in Montana. Although both the application and Groh's supporting affidavit stated that the search was for specified weapons, explosives, and records, the section of the warrant form calling for the description of the "person or property" to be seized, mistakenly contained a description of Ramirez's ranch house rather than the items of contraband being sought. Moreover, the warrant did not incorporate by reference the application's itemized list. Nevertheless, a U.S. Magistrate Judge signed the warrant form prepared by Groh, even though it failed to identify the items that Groh intended to seize.

The next day, Groh led a group of federal agents and county law enforcement officials to Ramirez's ranch to execute the search warrant. Mrs. Ramirez, but not Mr. Ramirez, was present during the search. No illegal weapons or explosives were discovered during the search. Groh left a copy of the warrant, but not the application with Mrs. Ramirez. Groh asserts that he orally described the objects of the search to Mrs. Ramirez in person, and to Mr. Ramirez by telephone. Mrs. Ramirez, however, disputes this assertion, claiming that Groh "explained only that he was searching for 'an explosive device in a box.'" The officers conducting the search acted professionally, exercising restraint in limiting the scope of the search to that indicated in the application. There is no evidence that suggests Groh acted maliciously, or that even his failure to include on the warrant form a list of the contraband that was being sought was anything other than a clerical oversight that was inadvertently made.

Ramirez filed a civil lawsuit against Groh and others in a *Bivens* action under 42 U.S.C. § 1983, claiming *inter alia*, a violation of his Fourth Amendment rights. The district court granted Groh and the other civil defendants summary judgment, finding no Fourth Amendment violation, and finding that even if such a violation occurred, all of the defendants were entitled to qualified immunity. The Ninth Circuit affirmed the district

CC:CT-112064-04

court's ruling, except as to the Fourth Amendment claim against Groh, ruling that the warrant was invalid and that Groh was not entitled to qualified immunity because he was the leader of the search party.

Holding:

A 7 to 2 majority on the Supreme Court held that Ramirez's constitutional rights were violated because the search warrant was plainly invalid because it did not adequately describe the persons or things to be seized. The Court observed that "[i]t is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. Because [Groh] did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly 'unreasonable' under the Fourth Amendment." Thus, the Court held the search to be unlawful despite clear probable cause and an adequate description contained in both the sealed affidavit and the unincorporated application.

By a 5 to 4 vote, the Supreme Court narrowly held that Groh, the affiant on the search warrant and the leader of the search party, acted unreasonably in carrying out a search with a fatally flawed warrant, and thus was not entitled to qualified immunity. Two dissents opined that Groh's actions were objectively reasonable under the circumstances and that he should be entitled to qualified immunity like the other agents and officers that participated in the search. Noteworthy *dicta* includes criticism of warrants that merely recite as items to be seized "fruits and instrumentalities" of a particular crime, noting that such warrants are considered invalid general searches under the Fourth Amendment.

United States v. Bridges

Facts:

Bridges, through his tax consulting business, ATC, advised clients to proclaim themselves non-resident aliens to avoid payment of Federal income taxes. From 1997 through 2000, ATC filed more than 100 claims with the IRS requesting tax refunds on behalf of its "non-resident alien" clients. After a successful undercover operation, a search warrant application was submitted and approved by a magistrate. The warrant, however, did not describe or allege the fraudulent activities that ATC and Bridges were suspected of committing. The closest the search warrant came to any allegation of criminal conduct was its reference to the affidavit. The affidavit, meanwhile, was neither incorporated by reference nor physically attached to the warrant. In fact, it was sealed. The attached list of items to be seized included a comprehensive laundry list of items one would expect to find in any small to medium sized business and included the following wording "including but not limited to."

CC:CT-112064-04

IRS Special Agents executed the search warrant on ATC's offices in January 2000. The agents seized ATC's computer system, client files, tax codes, correspondence from ATC's clients, ATC's seminar video tapes, and other business documents and equipment found on the premises. In April 2001, Bridges was convicted of, *inter alia*, filing false claims for refund and attempting to interfere with the administration of tax laws, based on evidence seized pursuant to the search warrant. Bridges appealed his conviction, arguing the search and seizure violated the Fourth Amendment because the warrant was defective and overbroad.

Holding:

Although the Ninth Circuit found the application for the search warrant was supported by the affidavit and was more than sufficient to demonstrate probable cause, it found the scope of the warrant itself overly broad and tantamount to a general warrant, since the affidavit was neither attached to the warrant nor incorporated by reference. The Ninth Circuit reviewed the Supreme Court's interpretation of the Fourth Amendment's particularity requirement as well as its prior decisions over the past twenty years and noted the purpose of the requirement is to ensure targets of search warrants are able to ascertain what crimes are alleged to have been committed and what corresponding items are authorized for seizure. Here, the warrant itself failed to allege any specific violations being investigated even though the agent's affidavit included sufficient detail. The court noted a warrant may be construed by reference to the affidavit only if the affidavit accompanies the warrant and if the warrant incorporates it by reference, neither of which applied here.

The court also criticized language in the list of items to be seized attached to the warrant, finding the verbiage "including, but not limited to" overly broad, since the effect was unclear what exactly the agents were expected to seize. It was also not enough for the district court to find the business permeated with fraud since the agent's affidavit did not clearly state the business was entirely fraudulent and there was no evidence the government thought the business was permeated with fraud when making its application.

ANALYSIS

Following the decisions in *Bridges* and *Ramirez*, it is clear courts will hold search warrants to a high standard. They will ensure that the warrant serves as a guide to the executing officer and gives fair notice to the occupant(s) of the premises to be searched of the reasons supporting the search (i.e., the alleged violations) and the items sought. The warrant, therefore, must be complete and specific on its face. An executing officer must be able to ascertain where they are going and what they intend to take from the

CC:CT-112064-04

warrant itself. Details contained in the search warrant application or affidavit that are not attached or incorporated by reference, will not be considered. Similarly, affidavits that are sealed will not be considered.

Moreover, the holding in *Ramirez* reinforces the vulnerability of CI special agents should there be errors in the drafting of a search warrant. The Supreme Court in *Ramirez* noted that the executing officer could not rely on the fact a magistrate had approved the warrant to avoid liability.

CONCLUSION

The holdings in *Ramirez* and *Bridges* reinforce the need for the actual warrant to be complete on its face. Agents must be mindful of the particular requirements when preparing their search warrant applications. Much effort goes into the creation of the agent's affidavit; however, the actual warrant must not be overlooked. We would encourage you to have your agents submit to CT attorneys for review the actual warrant in addition to their affidavit and Enforcement Action Review Form.

As a related matter, it is our understanding that the search warrant template on CI's Document Manager (copy attached) does not clearly instruct agents to include a list of potential violations on the face of the search warrant.

If we can be of further assistance to you regarding this matter, please feel free to contact me or Martin Needle of the Criminal Tax Division at (202) 622-4470.

Attachment: As Stated

United States District Court

AO93 (Rev. 6/92) Search Warrant

DISTRICT OF _____

(ENTER JUDICIAL DISTRICT)

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

SEARCH WARRANT

CASE NUMBER:
(Enter)

To: Special Agent Name (IRS-CI) and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Name (IRS-CI) who has reason to
Affiant

believe that on the person of or on the premises known as (name, description and/or location)

in the _____ Judicial District of _____ there is now
concealed certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____

Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to _____
as required by law.

U.S. Magistrate Judge

_____ at _____
Date and Time Issued

City and State

United States Magistrate Judge
Name and Title of Judicial Officer

Signature of Judicial Officer

RETURN

DATE WARRANT RECEIVED

DATE AND TIME WARRANT EXECUTED

COPY OF WARRANT AND RECEIPT LEFT WITH

INVENTORY MADE IN THE PRESENCE OF

INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT

CERTIFICATION

I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.

Subscribed, sworn to, and returned before me this date..

U.S. Judge or Magistrate Judge

Date

Attachment "A"

LOCATION TO BE SEARCHED

Attachment "B"

ITEMS TO BE SEIZED