DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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JASincavage

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to: Nancy J. Jardini
Chief, Criminal Investigation

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

subject: Does a search warrant affidavit kept under seal satisfy the Fourth Amendment's requirement that a search warrant describe with particularity the items to be seized where the affidavit is the only document containing the list of items to be seized?

RECOMMENDATION

In *Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco, and Firearms*, 452 F.3d 433 (6th Cir. 2006)[1], the Sixth Circuit, in an *en banc* rehearing, decided seven to six that an affidavit kept under seal and not present during execution of the search satisfies the Fourth Amendment's particularity requirement with respect to the items to be seized even where the affidavit is the only document that contains the list of items to be seized.

However, the court recognized there is a circuit split on this issue and was itself almost evenly divided. [redacted] DP only the Fourth and Sixth Circuits have adopted this rule, therefore the list of items to be seized must be present at the time of the search in all other jurisdictions regardless of the circumstances, either directly in the warrant or in the warrant by incorporation with the incorporated document attached at the time of execution.

EXECUTIVE SUMMARY

In September 1999, Keith Baranski ("Baranski"), a licensed firearms dealer, began importing machine guns into the United States from Eastern Europe. He imported the guns through a bonded customs warehouse owned by Pars International Corporation

[1] *See also Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco, and Firearms*, 252 F.Supp.2d 401 (W.D.Ky. 2003); 401 F.3d 419 (6th Cir. 2005).

("Pars") and located in Louisville, Kentucky. Federal law required Baranski to keep the guns until he could sell them to eligible law enforcement departments. Instead, Baranski removed the guns from the warehouse using forged letters of interest from a police chief in Farber, Missouri and sold them illegally.

A Bureau of Alcohol, Tobacco, and Firearms ("BATF") agent uncovered the scheme and, on April 10, 2001, applied for a search warrant that allowed authorities to search and seize about 425 weapons still held by Baranski at the Pars warehouse. As part of the warrant application, the BATF agent detailed the scheme, identified probable cause for the search, identified the bonded section of the warehouse as the place to be searched and identified the machine guns as the items to be seized. The search warrant did not list the items to be seized but rather said, "See Attached Affidavit". The magistrate judge signed both the affidavit and the warrant and sealed the affidavit to protect the BATF's confidential sources.

On April 11, 2001, BATF agents executed the search. Upon reaching the warehouse, an attorney for Pars appeared and asked to see the warrant. After reading the warrant, the attorney asked to see the affidavit, but was told it was under seal. An agent told the attorney the search was for firearms owned by Baranski and located in the bonded section of the warehouse. The attorney argued the search was illegal because the warrant itself failed to describe with sufficient particularity the items to be seized, but nonetheless cooperated. Once in the warehouse, agents seized 372 machine guns and 12 crates of firearms accessories belonging to Baranski. Upon leaving the warehouse, agents left an inventory of the items seized and a copy of the search warrant with Pars's attorney.

As a result of evidence seized during execution of the search warrant, Baranski was charged with and ultimately convicted of conspiring to import machine guns by making knowingly false entries on applications and other records, in violation of 26 U.S.C. § 5861(1). The district court sentenced him to 60 months' imprisonment followed by three years of supervised release and ordered forfeiture of the seized machine guns and crates.

On July 5, 2001, Baranski and Pars brought a *Bivens* claim in the United States District Court for the Western District of Kentucky against the BATF agents, seeking money damages on the grounds that the search warrant did not comport with the particularity requirement of the Fourth Amendment as to the items to be seized and the location to be searched. The district court dismissed the claim and the plaintiffs appealed to the Sixth Circuit.

The Sixth Circuit reversed the dismissal and the government petitioned for an *en banc* rehearing. Upon rehearing, the Sixth Circuit found in favor of the government and denied the *Bivens* claim on the basis that the search was legal and satisfied the Fourth Amendment requirements.

ANALYSIS

In its first hearing of the case, the Sixth Circuit relied upon *Groh v. Ramirez*, 540 U.S. 551, 561 (2004)[2], in reaching its decision. The court deemed the facts in *Groh* materially indistinguishable and held that the warrant procured for the search of Pars's warehouse was invalid and deficient as to the Fourth Amendment's particularity requirement because it provided no description of the type of evidence sought.

Quoting *Groh*, the Sixth Circuit stated that "[a]lthough the warrant used appropriate words of incorporation, the supporting documents that the warrant purported to incorporate did not accompany the warrant. Because [the agent] 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."[3]

In the *en banc* rehearing, the Sixth Circuit reversed its earlier decision and held the Fourth Amendment does not require a search warrant affidavit to accompany the warrant when it is executed, even if the affidavit is the only document containing a particular description of the items to be seized. The court concluded that the search did not violate the Fourth Amendment because the warrant described the items to be seized when the magistrate issued it and because the agents conducted the search in a reasonable manner.

In reaching its decision, the court distinguished *Baranski* from *Groh*. In *Groh*, the warrant was declared invalid because, although the agent had orally described the guns to be seized before the magistrate and the agent was present at the scene to ensure nothing else was seized, the warrant mistakenly described the location to be searched under the items to be seized. In distinguishing *Groh*, the Sixth Circuit concluded that *Groh* turned on the facial invalidity of the warrant, not the manner in which the officers

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[2] In *Groh v. Ramirez*, 540 U.S. 551 (2004), the Supreme Court held the Fourth Amendment requires a search warrant to expressly incorporate any necessary supporting documents and the warrant must be presented to the premises owner at the time of a search.

[3] *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco and Firearms*, 401 F.3d 419, 429 (6th Cir. 2005).

conducted the search. Here, the issue was the agent's failure to produce the accompanying affidavit at the time of the search and not a defect in the warrant or affidavit.

The Fourth Circuit joins the Sixth Circuit in finding incorporation by reference of the list of items to be seized does not require physical attachment. *See United States v. Hurwitz*, 2006 WL 2423078 (4th Cir. August 22, 2006). In *Hurwitz*, the Fourth Circuit held it was sufficient either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself. *See also United States v. Washington*, 852 F.2d at 803, 805 (4th Cir. 1988) (concluding that warrant was sufficiently particular where the warrant completely failed to refer to the supporting affidavit listing items to be seized but the affidavit was attached, and explaining that "[a]n affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant").

However, the majority of Circuit Courts of Appeals require the satisfaction of both conditions set forth in *Groh*[4], that is, words of incorporation are used and the incorporated document accompanies the warrant, before allowing a separate document to be read as part of the search warrant. *See Bartholomew v. Pennsylvania*, 221 F.3d 425, 428-29 (3rd Cir. 2000); *United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997); *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993); *United States v. Dale*, 301 U.S. App. D.C. 110, 991 F.2d 819, 846-47 (D.C. Cir. 1993) (per curiam); *United States v. Morris*, 977 F.2d 677, 681 n.3 (1st Cir. 1992); *United States v. Curry*, 911 F.2d 72, 77 (8th Cir. 1990).

CONCLUSION

The majority of circuits still require that documents incorporated into a search warrant must also be attached to the warrant at the time the search is executed to satisfy the Fourth Amendment particularity requirements. The Fourth and Sixth Circuits have carved out an exception where an affidavit incorporated into the warrant is placed under seal and the affidavit is the only document containing the list of items to be seized. In that situation, provided the warrant is not facially invalid, the search may be conducted and satisfy the Fourth Amendment particularity requirements without a copy of the incorporated document, the affidavit, available at the time of search.

[redacted]

[4] *Groh v. Ramirez*, 540 U.S. 551 at 557-558.