SUPREME COURT OF THE UNITED STATES

No. 02–811

JEFF GROH, PETITIONER *v.* JOSEPH R. RAMIREZ ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 24, 2004]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom THE CHIEF JUSTICE joins as to Part III, dissenting.

The Fourth Amendment provides: "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." The precise relationship between the Amendment's Warrant Clause and Unreasonableness Clause is unclear. But neither Clause explicitly requires a warrant. While "it is of course textually possible to consider [a warrant requirement] implicit within the requirement of reasonableness," *California* v. *Acevedo,* 500 U. S. 565, 582 (1991) (SCALIA, J., concurring in judgment), the text of the Fourth Amendment certainly does not mandate this result. Nor does the Amendment's history, which is clear as to the Amendment's principal target (general warrants), but not as clear with respect to when warrants were required, if ever. Indeed, because of the very different nature and scope of federal authority and ability to conduct searches and arrests at the founding, it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance.

As a result, the Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard. Compare *Thompson* v. *Louisiana,* 469 U. S. 17, 20 (1984) *(per curiam)*, with *United States* v. *Rabinowitz,* 339 U. S. 56, 65 (1950). The Court has most frequently held that warrantless searches are presumptively unreasonable, see, *e.g., Katz* v. *United States,* 389 U. S. 347, 357 (1967); *Payton* v. *New York,* 445 U. S. 573, 583 (1980), but has also found a plethora of exceptions to presumptive unreasonableness, see, *e.g., Chimel* v. *California,* 395 U. S. 752, 762–763 (1969) (searches incident to arrest); *United States* v. *Ross,* 456 U. S. 798, 800 (1982) (automobile searches); *United States* v. *Biswell,* 406 U. S. 311, 315–317 (1972) (searches of "pervasively regulated" businesses); *Camara* v. *Municipal Court of City and County of San Francisco,* 387 U. S. 523, 534–539 (1967) (administrative searches); *Warden, Md. Penitentiary* v. *Hayden,* 387 U. S. 294, 298 (1967) (exigent circumstances); *California* v. *Carney,* 471 U. S. 386, 390–394 (1985) (mobile home searches); *Illinois* v. *Lafayette,* 462 U. S. 640, 648 (1983) (inventory searches); *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 272 (1973) (border searches). That is, our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.

Today the Court holds that the warrant in this case was "so obviously deficient" that the ensuing search must be regarded as a warrantless search and thus presumptively unreasonable. *Ante*, at 6–7. However, the text of the Fourth Amendment, its history, and the sheer number of exceptions to the Court's categorical warrant requirement seriously undermine the bases upon which the Court today rests its holding. Instead of adding to this confusing jurisprudence, as the Court has done, I would turn to first principles in order to determine the relationship between the Warrant Clause and the Unreasonableness Clause. But even within the Court's current framework, a search

conducted pursuant to a defective warrant is constitutionally different from a "warrantless search." Consequently, despite the defective warrant, I would still ask whether this search was unreasonable and would conclude that it was not. Furthermore, even if the Court were correct that this search violated the Constitution (and in particular, respondents' Fourth Amendment rights), given the confused state of our Fourth Amendment jurisprudence and the reasonableness of petitioner's actions, I cannot agree with the Court's conclusion that petitioner is not entitled to qualified immunity. For these reasons, I respectfully dissent.

I

"[A]ny Fourth Amendment case may present two separate questions: whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless 'reasonable' within the meaning of the first." *United States* v. *Leon,* 468 U. S. 897, 961 (1984) (STEVENS, J., dissenting). By categorizing the search here to be a "warrantless" one, the Court declines to perform a reasonableness inquiry and ignores the fact that this search is quite different from searches that the Court has considered to be "warrantless" in the past. Our cases involving "warrantless" searches do not generally involve situations in which an officer has obtained a warrant that is later determined to be facially defective, but rather involve situations in which the officers neither sought nor obtained a warrant. See, *e.g., Anderson* v. *Creighton,* 483 U. S. 635 (1987) (officer entitled to qualified immunity despite conducting a warrantless search of respondents' home in the mistaken belief that a robbery suspect was hiding there); *Payton* v. *New York, supra,* (striking down a New York statute authorizing the warrantless entry into a private residence to make a routine felony arrest). By simply treating this case as if

no warrant had even been sought or issued, the Court glosses over what should be the key inquiry: whether it is always appropriate to treat a search made pursuant to a warrant that fails to describe particularly the things to be seized as presumptively unreasonable.

The Court bases its holding that a defect in the particularity of the warrant by itself renders a search "warrantless" on a citation of a single footnote in *Massachusetts* v. *Sheppard,* 468 U. S. 981 (1984). In *Sheppard*, the Court, after noting that "the sole issue . . . in th[e] case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant," *id.*, at 988, rejected the petitioner's argument that despite the invalid warrant, the otherwise reasonable search was constitutional, *id.*, at 988, n. 5. The Court recognized that under its case law a reasonableness inquiry would be appropriate if one of the exceptions to the warrant requirement applied. But the Court declined to consider whether such an exception applied and whether the search actually violated the Fourth Amendment because that question presented merely a "fact-bound issue of little importance." *Ibid.* Because the Court in *Sheppard* did not conduct any sort of inquiry into whether a Fourth Amendment violation actually occurred, it is clear that the Court assumed a violation for the purposes of its analysis. Rather than rely on dicta buried in a footnote in *Sheppard*, the Court should actually analyze the arguably dispositive issue in this case.

The Court also rejects the argument that the details of the warrant application and affidavit save the warrant, because "'[t]he presence of a search warrant serves a high function.'" *Ante*, at 5 (quoting *McDonald* v. *United States,* 335 U. S. 451, 455 (1948)). But it is not only the physical existence of the warrant and its typewritten contents that serve this high function. The Warrant Clause's principal protection lies in the fact that the "Fourth Amendment

has interposed a magistrate between the citizen and the police . . . . so that an objective mind might weigh the need to invade [the searchee's] privacy in order to enforce the law." *Ibid.* The Court has further explained,

> "The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States,* 333 U. S. 10, 13–14 (1948) (footnotes omitted).

But the actual contents of the warrant are simply manifestations of this protection. Hence, in contrast to the case of a truly warrantless search, a warrant (due to a mistake) does not specify on its face the particular items to be seized but the warrant application passed on by the magistrate judge contains such details, a searchee still has the benefit of a determination by a neutral magistrate that there is probable cause to search a particular place and to seize particular items. In such a circumstance, the principal justification for applying a rule of presumptive unreasonableness falls away.

In the instant case, the items to be seized were clearly specified in the warrant application and set forth in the

affidavit, both of which were given to the Judge (Magistrate). The Magistrate reviewed all of the documents and signed the warrant application and made no adjustment or correction to this application. It is clear that respondents here received the protection of the Warrant Clause, as described in *Johnson* and *McDonald*. Under these circumstances, I would not hold that any ensuing search constitutes a presumptively unreasonable warrantless search. Instead, I would determine whether, despite the invalid warrant, the resulting search was reasonable and hence constitutional.

II

Because the search was not unreasonable, I would conclude that it was constitutional. Prior to execution of the warrant, petitioner briefed the search team and provided a copy of the search warrant application, the supporting affidavit, and the warrant for the officers to review. Petitioner orally reviewed the terms of the warrant with the officers, including the specific items for which the officers were authorized to search. Petitioner and his search team then conducted the search entirely within the scope of the warrant application and warrant; that is, within the scope of what the Magistrate had authorized. Finding no illegal weapons or explosives, the search team seized nothing. *Ramirez* v. *Butte-Silver Bow County,* 298 F. 3d 1022, 1025 (CA9 2002). When petitioner left, he gave respondents a copy of the search warrant. Upon request the next day, petitioner faxed respondent a copy of the more detailed warrant application. Indeed, putting aside the technical defect in the warrant, it is hard to imagine how the actual search could have been carried out any more reasonably.

The Court argues that this eminently reasonable search is nonetheless unreasonable because "there can be no written assurance that the Magistrate actually found

probable cause to search for, and to seize, every item mentioned in the affidavit" "unless the particular items described in the affidavit are also set forth in the warrant itself." *Ante*, at 8. The Court argues that it was at least possible that the Magistrate intended to authorize a much more limited search than the one petitioner requested. *Ibid.* As a theoretical matter, this may be true. But the more reasonable inference is that the Magistrate intended to authorize everything in the warrant application, as he signed the application and did not make any written adjustments to the application or the warrant itself.

The Court also attempts to bolster its focus on the faulty warrant by arguing that the purpose of the particularity requirement is not only to prevent general searches, but also to assure the searchee of the lawful authority for the search. *Ante*, at 10. But as the Court recognizes, neither the Fourth Amendment nor Federal Rule of Criminal Procedure 41 requires an officer to serve the warrant on the searchee before the search. *Ante*, at 10, n. 5. Thus, a search should not be considered *per se* unreasonable for failing to apprise the searchee of the lawful authority prior to the search, especially where, as here, the officer promptly provides the requisite information when the defect in the papers is detected. Additionally, unless the Court adopts the Court of Appeals' view that the Constitution protects a searchee's ability to "be on the lookout and to challenge officers," while the officers are actually carrying out the search, 298 F. 3d, at 1027, petitioner's provision of the requisite information the following day is sufficient to satisfy this interest.

III

Even assuming a constitutional violation, I would find that petitioner is entitled to qualified immunity. The qualified immunity inquiry rests on "the 'objective legal reasonableness' of the action, *Harlow* [v. *Fitzgerald,* 457

U. S. 800, 819 (1982)], assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson* v. *Creighton,* 483 U. S., at 639. The outcome of this inquiry "depends substantially upon the level of generality at which the relevant 'legal rule' is . . . identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause . . . violates a clearly established right." *Ibid.* To apply the standard at such a high level of generality would allow plaintiffs "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Ibid.* The Court in *Anderson* criticized the Court of Appeals for considering the qualified immunity question only in terms of the petitioner's "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances." *Id.*, at 640. The Court of Appeals should have instead considered "the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.*, at 641.

The Court errs not only by defining the question at too high a level of generality but also by assessing the question without regard to the relevant circumstances. Even if it were true that no reasonable officer could believe that a search of a home pursuant to a warrant that fails the particularity requirement is lawful absent exigent circumstances—a proposition apparently established by dicta buried in a footnote in *Sheppard*—petitioner did not know when he carried out the search that the search warrant was invalid—let alone legally nonexistent. Petitioner's entitlement to qualified immunity, then, turns on whether his belief that the search warrant was valid was objec-

tively reasonable. Petitioner's belief surely was reasonable.

The Court has stated that "depending on the circumstances of the particular case, a warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *United States* v. *Leon,* 468 U. S., at 923. This language makes clear that this exception to *Leon*'s good-faith exception does not apply in every circumstance. And the Court does not explain why it should apply here. As an initial matter, the Court does not even argue that the fact that petitioner made a mistake in preparing the warrant was objectively unreasonable, nor could it. Given the sheer number of warrants prepared and executed by officers each year, combined with the fact that these same officers also prepare detailed and sometimes somewhat comprehensive documents supporting the warrant applications, it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors.

The only remaining question is whether petitioner's failure to notice the defect was objectively unreasonable. The Court today points to no cases directing an officer to proofread a warrant after it has been passed on by a neutral magistrate, where the officer is already fully aware of the scope of the intended search and the magistrate gives no reason to believe that he has authorized anything other than the requested search. Nor does the Court point to any case suggesting that where the same officer both prepares and executes the invalid warrant, he can never rely on the magistrate's assurance that the warrant is proper. Indeed, in *Massachusetts* v. *Sheppard,* 468 U. S. 981 (1984), the Court suggested that although an officer who is not involved in the warrant application process would normally read the issued warrant to determine the object of the search, an executing officer who is also the affiant might not need to do so. *Id.*, at 989, n. 6.

Although the Court contends that it does not impose a proofreading requirement upon officers executing warrants, *ante*, at 11, n. 6, I see no other way to read its decision, particularly where, as here, petitioner could have done nothing more to ensure the reasonableness of his actions than to proofread the warrant. After receiving several allegations that respondents possessed illegal firearms and explosives, petitioner prepared an application for a warrant to search respondents' ranch, along with a supporting affidavit detailing the history of allegations against respondents, petitioner's investigation into these allegations, and petitioner's verification of the sources of the allegations. Petitioner properly filled out the warrant application, which described both the place to be searched and the things to be seized, and obtained the Magistrate's signature on both the warrant application and the warrant itself. Prior to execution of the warrant, petitioner briefed the search team to ensure that each officer understood the limits of the search. Petitioner and his search team then executed the warrant within those limits. And when the error in the search warrant was discovered, petitioner promptly faxed the missing information to respondents. In my view, petitioner's actions were objectively reasonable, and thus he should be entitled to qualified immunity.

For the foregoing reasons, I respectfully dissent.