UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 09-CR-230

HARRY C. GLINBERG,

Defendant.

DEFENDANT'S POST-HEARING BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND MOTION TO SUPPRESS STATEMENTS

On July 15, 2010, the Court held an evidentiary hearing on the defendant's Motion to Suppress Evidence and Motion to Suppress Statements. Mr. Glinberg submits this brief in support of each motion.

I. MOTION TO SUPPRESS EVIDENCE

A. Introduction.

On August 30, 2006, numerous federal agents conducted a search of Mr. Glinberg's home and his business, Glinberg Jewelers in Wauwatosa. The search was conducted pursuant to a warrant issued by the Honorable Aaron E. Goodstein on August 29, 2006, at 3:15 p.m.

The warrant itself does not describe the items to be seized. It simply says: "See Attachment 3."

The record now establishes that there was no Attachment 3 attached to the search warrant. Attachment 3 probably was not attached to the search warrant when the search warrant[1] was signed. It certainly was not attached to the search warrant when the warrant was executed, and it certainly was not attached to the search warrant when it was returned to the court.

Mr. Glinberg's case has been pending for four years in one form or another. The original case was dismissed by the government and Mr. Glinberg was reindicted. That indictment was superseded.

Although the search warrant, the search warrant application, and Attachment 1 and Attachment 2 to the warrant were provided by the government in discovery to prior counsel for Mr. Glinberg (Tom Brown) and then to the undersigned counsel, no copy of Attachment 3 was ever contained in the open file. In fact, a document titled "Attachment 3" was not located and produced in discovery until earlier this year, when Mr. Glinberg filed the present motion.

To this day, the government has been unable to provide a copy of the search warrant issued by Magistrate Judge Goodstein with Attachment 3 attached to it. That is because it simply does not exist.

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[1] There were two search warrants issued by Magistrate Judge Goodstein on August 29, 2006, one for Mr. Glinberg's home and one for his business. For ease of reference, this memorandum will simply refer to "the search warrant."

The leading case in this regard is *Groh v. Ramirez*, 540 U.S. 551 (2004). *Groh* was a *Bivens* action arising from a search of the plaintiff's ranch in Montana by ATF agents. The agents submitted a detailed application establishing probable cause to search 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." *Id.* at 554. However, the search warrant itself described only the plaintiff's house and did not list the "stockpile of firearms" that the agents hoped to seize. *Id*. Nor did the warrant incorporate by reference the itemized list attached to the application. *Id*. at 545-55.

The Supreme Court took a textual approach to the Fourth Amendment and concluded that "[t]he warrant was plainly invalid." *Id*. at 557. The Supreme Court emphasized that the Fourth Amendment specifically requires that a search warrant must "particularly describe the persons or things to be seized." *Id*. "The fact that the *application* adequately described the things to be seized does not save the *warrant* from its facial invalidity." *Id*. (emphasis in original).

The Court emphasized that the Fourth Amendment, by its terms, requires particularity in the warrant, not the supporting documents. *Id*. A warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. *Id*. (citations omitted).

This is so because the 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... ." *Id*.

A search warrant may cross-reference other documents, but a court may construe a warrant with reference to a supporting document only if: (1) the warrant uses appropriate words of incorporation, and (2) the document accompanies the warrant. *Id*. at 557-58 (citations omitted). The warrant in *Groh* did not incorporate the itemized list of things to be seized, nor was the list attached to the warrant – and thus it violated the Fourth Amendment. *Id*. at 558.

B. The Search Warrant Fails to Adequately Incorporate Attachment 3 by Reference.

With respect to the items to be seized, the search warrant in this case simply says: "See Attachment 3." The warrant does *not* say that Attachment 3 is "attached hereto," or that it is incorporated by reference.

As noted, the Supreme Court in *Groh* indicated that the search warrant must use "appropriate words of incorporation." Lower court decisions following *Groh* have held that the warrant must contain "deliberate and unequivocal language of incorporation" in order to incorporate another document, and not merely refer to the document. *See, e.g., United States v. Cohan*, 628 F. Supp. 2d 355, 357-63 (E.D.N.Y. 2009) (citations omitted) (finding that search warrant referencing items to be seized as "items listed in the attached rider" was insufficient).

The term "incorporation by reference" is defined by Black's Law Dictionary as follows:

> The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein.

Black's Law Dictionary (Sixth Edition).

The warrant issued in the present case does not contain deliberate and unequivocal language of incorporation. An example would be "See Attachment 3, which is attached hereto and incorporated by reference" or "See Attachment 3, which is attached hereto and made a part of this warrant."

As the Supreme Court noted, it is not enough for the warrant to reference "some other document, somewhere, that says something about the objects of the search," *see Groh*, 540 U.S. at 557, as the search warrant in this case merely does. Accordingly, on this basis alone, the Court should grant the defendant's motion.

C. Attachment 3 Was Not Attached to the Search Warrant.

The second defect in the search warrant is that, unlike Attachment 1 (a photograph of the building in which Glinberg Jewelers is located) and Attachment 2 (a photograph of Mr. Glinberg's home), Attachment 3 was not attached to the warrant.

The evidence concerning the existence and whereabouts of Attachment 3 when the search warrant was issued, executed and returned can be summarized as follows:

- SA Jones signed the warrant and warrant application on August 29, 2006. He has no recollection of seeing Attachment 3 that day (Tr. 73). He has no recollection of AUSA Resler bringing Attachment 3 to chambers on August 29, 2006 (Tr. 85-86);
- Magistrate Judge Goodstein signed the warrant on August 29, 2006, at 3:15 p.m. (Defense Exhibit 1001);
- AUSA Resler and SA Jones were in chambers for about five minutes. After the warrant was signed, the Magistrate Judge's secretary (Cora Quinn) made copies (Tr. 73);
- The normal procedure is that SA Jones and the AUSA Resler would have each left chambers with an exact copy of what the Magistrate Judge had just issued (Tr. 107-108);
- SA Jones then went back to his office and arrived at about 3:45 p.m. (Tr. 88). He made copies of the search warrant for the team leaders. He also made approximately ten copies of Attachment 3 for the agents (Tr. 74-75; 78);
- Although AUSA Resler and SA Jones should have left chambers with an exact duplicate of the documents issued by the Magistrate Judge at 3:15 p.m., at 5:04 p.m. AUSA Resler sent an e-mail to SA Jones with the "final version" of Attachment 3 (Tr. 82; Government Exhibit 4);

- SA Lindberg was the team leader for the search of the business. SA Carlson was the team leader for the search of the house (Tr. 79);
- SA Jones put the copies of Attachment 3 in a manilla folder (Tr. 79). He put the manilla folder on SA Lindberg's chair. He gave the other folder to SA Carlson at the Mequon Police Department prior to the search (Tr. 90);
- Neither SA Lindberg nor SA Carlson testified at the evidentiary hearing, nor did any other agent involved in the search. There is no testimony in the record that Attachment 3 was provided to the agents executing the search warrants;
- SA Jones personally gave no instructions to any agent with respect to the items to be seized (Tr. 80);
- After the searches were completed, SA Carlson and SA Lindberg did not return their copies of the warrant to SA Jones (Tr. 92). No copy of Attachment 3 was returned to SA Jones by any agent (Tr. 93);
- SA Jones has no recollection of returning Attachment 3 to Magistrate Judge Goodstein in the search warrant return process (Tr. 95);
- After the original search warrant and supporting documents were returned to the Magistrate Judge, Ms. Quinn would have put the original documents in the court file, along with the court's "placeholder copy." She then would have provided this file to the clerk's office (Tr. 109);

- The clerk's office scans the warrant and attachments into the ECF system. They return the original warrant and attachments to the court file, and dispose of the placeholder copy (Tr. 110);
- Both the physical court file (the paper file) and the copy available on PACER contain: (1) the search warrants; (2) the application; (3) Attachment 1; and (4) Attachment 2. There is no Attachment 3 in either file (Stipulation);
- No copy of Attachment 3 was provided to Mr. Glinberg's prior attorney, Tom Brown, in discovery (Stipulation). No copy was provided to the undersigned counsel until SA Jones and AUSA Resler became aware of the issue when this motion was filed (Tr. 99-100; Stipulation).

The record clearly establishes that Attachment 3 was not attached to the search warrant, nor did it otherwise accompany the search warrant when the warrant was issued, executed and returned. How and why that happened is largely irrelevant. The search warrant in this case failed to particularly describe the items to be seized and, pursuant to *Groh*, is "plainly invalid."

D. Suppression is the Appropriate Remedy.

The government asserts that suppression is not appropriate because the agents did not exceed the scope of the warrant and thus suppression would do nothing to deter unlawful police conduct (Government Memorandum, p. 7).

Initially, it should be noted that this claim is unsupported by the record. The government presented no evidence at the evidentiary hearing as to the scope of the search or any of the items seized pursuant to the execution of the warrant.

Moreover, the ATF agents in *Groh* made this same argument and it was rejected. *Groh*, 540 U.S. at 558. The Court found that, in the first instance, the warrant "did not describe the items to be seized *at all*," and thus was so obviously deficient that the Court found the search to have been warrantless. *Id*. (emphasis in original).

Such a search is presumptively unreasonable and violates the core Fourth Amendment concern that a man be free from unreasonable government intrusion into his home, *id*., regardless of whether the scope of the search did not exceed the limits intended by the court.

The *Groh* court also specifically rejected the ATF agents' "good faith" arguments under the qualified immunity doctrine, which involved the same analysis as the objective reasonableness standard for a motion to suppress evidence, as set forth in *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *Groh*, 540 U.S. at 563-64, n. 8. The Court found that no reasonable officer would have believed that a warrant "so facially deficient" was valid. *Id*. Nor would a reasonable officer be unaware of the particularity requirement set forth in the Court's jurisprudence. *Id*. at 564.

In a post-*Groh* case, the court in *United States v. Cioffi*, 668 F. Supp. 2d 385 (E.D.N.Y. 2009), reached the same conclusion. In *Cioffi*, the court found a warrant for the

defendant's e-mail account to be invalid because the warrant did not limit the items to be seized, nor did it incorporate or attach the supporting affidavit. *Id*. at 396.

The court rejected the notion that the evidence should not be suppressed under the *Leon* good faith doctrine. The court found that no reasonable officer would rely on such a general warrant, nor would a reasonable officer be unaware of the need for formal attachment and incorporation of the supporting document. *Id*. at 397.

The district judge in *Cioffi* also noted that "*Groh* has been on the books since 2004." *Id*. No reasonable officer would be unaware of its requirements. *Id*.

Indeed, the IRS Special Agent Manual, Part 9, Criminal Investigation, at §9.4.9.3, Search Warrant Process, states as follows:

> Note:
> The Supreme Court, in *Groh v. Ramirez*, 124 S. Ct. 1284 (February 24, 2004), ruled 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. 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), clearly highlights the need for a warrant to contain on its face or in an incorporated and attached search warrant application, sufficient information to instruct both the executing officer and the occupant of the place to be searched of the nature of the alleged violation(s) and the description of the items to be seized.

(Available online at www.irs.gov/irm/part9/irm_09-004-009.html)

The IRS' own manual stresses the importance of *Groh* and the requirement of attachment and incorporation. Accordingly, the Court should reject the government's good faith argument here. The Court should conclude that the search warrant in this case was invalid because it failed to particularly describe the items to be seized, and order suppression of all evidence seized pursuant to its execution, as well as all fruits and leads derived from that evidence.

II. MOTION TO SUPPRESS STATEMENTS

A. Sixth Amendment Claim.

The Sixth Amendment right to counsel is triggered at or after the time that judicial proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Brewer v. Williams*, 430 U.S. 387 (1977) (citation omitted). The Supreme Court has held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents...deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201 (1964).

The Court has consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases. *See Fellers v. United States*, 540 U.S. 519, 524 (2004) (accumulating cases). This standard is distinguished from the Fifth Amendment custodial-interrogation standard. *Id*., *citing Michigan v. Jackson*, 475 U.S. 625, 632, n.5.

In *Fellers*, *supra*, agents came to the defendant's home to arrest him after he had been indicted. They engaged him in a conversation about the charges. *Id*. at 521. The defendant made an incriminating statement. *Id*. The entire encounter lasted fifteen minutes. *Id*.

The Supreme Court found that there was "no question" that the agents deliberately elicited information from the defendant. *Id*. at 524. Because the ensuing discussion took place after the defendant had been indicted, outside the presence of counsel, and in the absence of a waiver of the defendant's Sixth Amendment rights, the officer's actions violated the Sixth Amendment standard set forth in *Massiah*. *Id*.

In the present case, Mr. Glinberg had been charged in a federal criminal complaint issued by Magistrate Judge Goodstein on August 29, 2006. The agents also had an arrest warrant issued by Magistrate Judge Goodstein that same day.

Almost immediately after the agents entered his home, Mr. Glinberg invoked his Sixth Amendment right to counsel before he made any statements (Tr. 14, 33). At no time in the subsequent encounter with the agents did Mr. Glinberg waive that right. His efforts to reach Mr. Guerin, or another lawyer at the Gimbel firm, were controlled by Special Agent Jones and Special Agent Glunz. That is, Mr. Glinberg only attempted to reach the Gimbel firm when he was allowed to do so by the agents (Tr. 15, 25, 43).

SA Glunz's role that day was to interview Mr. Glinberg (Tr. 36). SA Jones and SA Glunz had already placed Mr. Glinberg under arrest upon arriving (Tr. 18). Nevertheless,

they sat with Mr. Glinberg at his kitchen table, at times in "uncomfortable silence" (Tr. 15, 19, 20, 34, 39-40).

The agents sat with Mr. Glinberg for forty-five minutes before he was allowed to call the Gimbel firm a second time (Tr. 43). When asked why it took forty-five minutes before Mr. Glinberg was allowed to call his lawyer again, SA Glunz testified that they were busy with "other things," such as securing jewelry, cash and a gun (Tr. 43).

SA Jones testified that, rather than leaving Mr. Glinberg at the scene with the agents for forty-five minutes, he could have been arrested and taken to the federal building at "any time" (Tr. 103).

During this forty-five minute period, the agents engaged Mr. Glinberg in discussion about "procedural matters" and made "small talk" with him (Tr. 19, 23, 39, 57).

It is evident that the strategy to leave Mr. Glinberg at the scene with the agents for forty-five minutes after he invoked his right to counsel was designed to create "a situation likely to induce [him] to make incriminating statements without the assistance of counsel." *United States v. Henry*, 447 U.S. 264, 274 (1980). As the Supreme Court has found, "[c]onversations stimulated in such circumstances may elicit information that the accused would not intentionally reveal." *Id*. at 273.

By SA Jones' own admission, there was no legitimate law enforcement purpose in leaving Mr. Glinberg with the agents at the scene after he had been arrested and invoked his right to counsel. Any reasonable person in Mr. Glinberg's position might have engaged the

agents in a conversation about the nature of the charges, the seriousness of which was underscored by the presence of 15 officers in his home.

Accordingly, the Court should find a Sixth Amendment violation and order suppression of all the statements made by the defendant.

B. Fifth Amendment Claim.

On Fifth Amendment grounds, all statements made by Mr. Glinberg after the two "volunteered" statements should be suppressed. These statements should be suppressed because they were made in response to interrogation by SA Glunz after the defendant invoked his rights.

The first such statement is outlined at pages 16 and 17 of the transcript. SA Glunz specifically asked Mr. Glinberg if he filed a Form 8300, and how many Form 8300's he had filed. Mr. Glinberg responded to both questions. The second statement is found at pages 20 and 21 of the transcript. SA Glunz asked Mr. Glinberg what he meant by using the term "those guys." Mr. Glinberg's response ("drug dealer types") was in response to a specific question by SA Glunz.

Even if the court finds no Sixth Amendment violation, these two statements should be suppressed on Fifth Amendment grounds because they were elicited in response to custodial interrogation after Mr. Glinberg invoked his right to counsel.