No. 11-748

In The
Supreme Court of the United States

SIGNATURE PHARMACY, INC., et al.,

Petitioners,

v.

ALEX WRIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NICHOLAS A. SHANNIN, ESQUIRE
Florida Bar No. 0009570
PAGE, EICHENBLATT, BERNBAUM & BENNETT, P.A.
214 East Lucerne Circle
Orlando, Florida 32801
407-386-1900
407-209-1006 (fax)
nshannin@floridalawonline.com
Counsel for Respondent Alex Wright

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals' opinion regarding the qualified immunity of a police officer was appropriate when the search warrants had received thorough evaluation and review by a circuit court judge prior to executing the warrants, when the warrants provided sufficient particularity regarding the location of the premises and items to be taken and when no conflict exists between the opinion below and this Court or other circuit courts.

PARTIES TO THE PROCEEDING

The Petitioners are Signature Pharmacy, Inc. ("Signature Pharmacy"), Robert Stan Loomis ("Robert Loomis"), Kenneth Michael Loomis ("Kenneth Loomis"), Naomi Loomis ("Naomi Loomis"), Kirk Calvert ("Calvert"), and Tony Palladino ("Palladino") (collectively, the "Plaintiffs").

The Respondent is Alex Wright ("Wright"), a law enforcement officer affiliated with the Metropolitan Bureau of Investigation located in Orlando, Florida. Alex Wright is an individual and therefore has no parent company, subsidiary, or affiliate, pursuant to Supreme Court Rule 29.6.

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RESPONDENT'S BRIEF IN OPPOSITION

Alex Wright respectfully opposes the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, issued July 19, 2011. The opinion of the Eleventh Circuit was reproduced in the Appendix to the Petition ("Pet. App.") at 1a-14a. That opinion remains unpublished, but may be located in the Federal Appendix as *Signature Pharm., Inc. v. Wright*, 438 F. App'x 741 (11th Cir. 2011). The district court opinion is reported as *Signature Pharm., Inc. v. Soares*, 717 F. Supp. 2d 1276 (M.D. Fla. 2010), and reproduced in the Appendix to the Petition at Pet. App. B, 15a-57a.

STATEMENT OF THE CASE

A. The Parties.

Signature Pharmacy, Inc., was a compounding pharmacy with business locations in Winter Park, Florida and Orlando, Florida. (App. A, P. 3). Plaintiffs, Stan Loomis, Mike Loomis and Naomi Loomis, owned Signature Pharmacy, while Plaintiffs, Kirk Calvert and Tony Palladino, were their employees. Signature Pharmacy was being investigated for knowingly providing steroids and human growth hormone in the absence of an appropriate physician-patient relationship, to individuals who had no legitimate medical need for those prescriptions. (App. A, Pp. 2-3). On February 27, 2007, Stan Loomis, Mike Loomis,

Naomi Loomis and Kirk Calvert were arrested on warrants from Albany, New York relating to their indictments for unlawful sale of controlled substances, diversion of prescription medications, and enterprise corruption in violation of New York law. [Court of Appeals Record ("C.A. App.") Dkt. 3, ¶16]. On the same day as the Plaintiffs' arrests, a search warrant was executed on Signature Pharmacy's business locations. [C.A. App. Dkt. 3, ¶¶1, 17].

Prior to the Plaintiffs' arrests and the execution of the search warrants, there was a lengthy criminal investigation. Officer Wright, a nineteen-year veteran of the Orlando Police Department, was assigned to the Signature case in November of 2005. (App. A, P. 3). At all times material, Officer Wright was assigned to the Metropolitan Bureau of Investigation (hereinafter referred to as "MBI"). [C.A. App. Dkt. 129-1, ¶3]. MBI is a task force comprised of employees from the Ninth Judicial Circuit State Attorney's Office, Orange County Sheriff's Office, City of Orlando Police Department and various federal agencies, such as the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI). [C.A. App. Dkt. 129-1, ¶3]. Officer Wright is an experienced and well-trained MBI agent. During his law enforcement career, Officer Wright attended a number of courses and received numerous hours of training relating to undercover drug operations and the enforcement of laws relating to the possession, sale, and distribution of controlled substances. [C.A. App. Dkt. 129-1, ¶5]. In January of

2006, Officer Wright attended a course entitled Compliance Investigation/Pharmaceutical Diversions Course, which dealt specifically with pharmaceutical crimes. [C.A. App. Dkt. 129-1, ¶5].

In addition to these parties, the case below involved co-defendants who are part of a separate appeal, now resolved by the Eleventh Circuit Court of Appeals. *Signature Pharm., Inc. v. Soares*, 717 F. Supp. 2d 1279 (M.D. Fla. 2010). Defendant P. David Soares took office as the Albany County District Attorney in January of 2005. Defendant Christopher P. Baynes, an Albany County Assistant District Attorney since 1994, was the head of the Financial Crimes Unit at the Albany County District Attorney's Office. [C.A. App. Dkt. 239-1, P. 73].

The Albany County District Attorney commenced its investigation into sales of controlled substances in 2005 following the successful prosecution of a physician on charges related to unlawful prescription of steroids. [C.A. App. Dkt. 239-2, Pp. 8-49]. Albany County was involved with Signature Pharmacy pursuant to its jurisdiction over out-of-state actors who shipped or agreed to ship controlled substances to areas within the Albany County boundaries. *NY Crim. Proc. L.*, § 20.60(2).

B. The Warrant.

After the Florida investigation obtained evidence by way of trash pulls and a wiretap, the statewide prosecutor believed there was sufficient probable

cause to obtain a search warrant for Signature Pharmacy. [C.A. App. Dkt. 129-1, ¶17]. Officer Wright was directed to prepare the application and affidavit in support of the search warrant. [C.A. App. Dkt. 129-1, ¶17]. Prior to being submitted to the court, a final review and approval of the affidavit was performed by the Statewide Prosecutor. [C.A. App. Dkt. 129-2, ¶17]. The court subsequently issued the search warrants for Signature Pharmacy's business locations. The affidavits submitted in support of the search warrants were placed under seal by court order.

Officer Wright supervised the execution of the search warrant at Signature's business location on Kuhl Avenue. [C.A. App. Dkt. 129-1, ¶18]. A DEA Special Agent supervised the execution of the search warrant of Signature's business location on Aloma Avenue. [C.A. App. Dkt. 129-1, ¶18]. A Federal Duty Administrative Special Agent was available to assist in the identification of contraband at either business location. [C.A. App. Dkt. 129-1, ¶18]. During the execution of the search warrants, anabolic steroids and human growth hormone were seized. [C.A App. Dkt. 129-1, ¶18]. Additional evidence relevant to the illegal sale and distribution of prescription drugs in violation of state and federal law was also seized. [C.A. App. Dkt. 129-1, ¶18]. Signature's computers were not seized, but the hard drives were copied. [C.A. App. Dkt. 129-1, ¶18].

C. Petitioners' Complaint.

Petitioners filed a civil complaint, subsequently amended, against numerous entities and individuals, including Officer Wright. [C.A. App. Dkt. 3]. Petitioners sued Officer Wright pursuant to 42 U.S.C. § 1983 (2006) claiming (1) unlawful seizure of Petitioners' property without probable cause and outside the scope of any valid search warrant; (2) unlawful arrest; (3) malicious prosecution; (4) defamation; and (5) unlawful conspiracy. (App. A, P. 2). The Complaint referenced, among other allegations, that Officer Wright exceeded the scope of the "illegally obtained search warrants," seizing items "not encompassed" in the "broad warrants." [C.A. App. Dkt. 3, ¶ 119]. Petitioners did not allege anywhere within their complaint that the warrants failed to describe their two locations. Their two locations were described by the Petitioners within their amended complaint as follows:

> 1. SIGNATURE, a retail and compounding pharmacy, is a Florida corporation located in Winter Park, Orange County, Florida. SIGNATURE previously and at times material to this action also operated an additional pharmacy location in Orlando, Orange County, Florida. (The two pharmacy locations at times shall be collectively referred to as the "Pharmacy Locations").

[C.A. App. Dkt. 3, ¶1]. No reference was contained within any of the allegations raised regarding either the existence of sublessors or other tenants.

D. The District Court Opinion, Finding Qualified Immunity As To Probable Cause Appropriate.

Officer Wright timely moved for summary judgment, citing to the court the legal basis based upon the principle of qualified immunity and attaching the relevant documents, including the search warrants at issue. The District Court granted Wright's motion regarding the claims of unlawful arrest, malicious prosecution, and defamation. (App. A, P. 2; App. B, Pp. 51-55).

The District Court denied, however, summary judgment as to the unlawful seizure claim. (App. B, 51). In doing so, the District Court first analyzed whether or not there was sufficient probable cause for the warrants. (App. B, Pp. 41-45). In making its review, the District Court noted that, "[w]hen a search or seizure is authorized by a warrant, courts must give 'great deference' to the issuing magistrate's determination of probable cause." (App. B, P. 41). The District Court later emphasized that it was, "[e]specially true where, as here, there is a significant presumption that attaches to the Florida state court's determination of probable cause." (App. B, P. 44). The District Court ultimately concluded that, "[i]n short, whatever deficiencies may have existed in the affidavit, this court simply cannot conclude that the warrant was 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" (App. B, Pp. 44-45, internal citations omitted). As a result, the District Court granted summary

judgment, on qualified immunity grounds, as to Signature Pharmacy's claims that the search warrants applied for by Officer Wright were not issued upon probable cause. (App. B, P. 45).

Despite holding that the officer's reliance on the Florida state court's determination of probable cause deserved deference, and a finding of qualified immunity, the District Court nonetheless held that qualified immunity would not be appropriate as to the validity of the warrants based upon the particularity requirements of the Fourth Amendment, and denied summary judgment on the unlawful conspiracy claim. (App. A, P. 3; App. B, Pp. 51-55). Officer Wright timely appealed that decision to the Eleventh Circuit Court of Appeals.

E. The Eleventh Circuit Court Of Appeals' Opinion, Finding Qualified Immunity Appropriate As To The Remaining Issues.

On appeal, the Eleventh Circuit Court of Appeals concluded that Officer Wright was entitled to qualified immunity for the two remaining Section 1983 claims and reversed. (App. A, P. 3). The per curiam opinion was the unanimous decision of the three judge panel who reviewed the matter on appeal. (App. A, P. 2). In reaching this determination, the Eleventh Circuit specifically noted the involvement of the circuit court judge in the search warrant process, stating that:

> On August 4, 2006, Wright applied for a wiretap with Judge Kest of the Ninth Circuit Court, in and for Orange and Osceola Counties in Florida. Judge Kest approved the wiretap, and Wright began monitoring Signature's phone and fax lines for the next 60 days.
>
> On February 26, 2007, at approximately 8:00 p.m., Wright went to Judge Kest's home with applications for search warrants for the Signature Pharmacy locations. After a thorough, hour-long review of the application and supporting materials, Judge Kest authorized the search warrants.
>
> The next day, the 27th of February, Wright, Baynes, Soares, agents from the DEA, and Orlando police officers executed the search warrants at Signature's Winter Park and Orlando, Florida locations and arrests were made. The search was executed in compliance with the warrants issued by Judge Kest.

(App. A, Pp. 3-4).

Based upon those facts, the court summarized the issue as follows: "Wright contends that a reasonable officer could rely upon the warrants and that he was not plainly incompetent or knowingly violating the law in doing so." (App. A, P. 7, citation omitted). The court held that, "[w]e agree. Because the warrants contained detailed descriptions of the items to be seized and were signed by a state court judge after careful examination, we conclude that Wright's

reliance on the warrants in executing his search of the premises was reasonable." (App. A, P. 7).

The Eleventh Circuit then specifically addressed each of the arguments raised below. Regarding the warrants, the court explained that "[a] search warrant's description is sufficient if it enables an officer to ascertain and identify, with reasonable effort, the place intended to be searched." (App. A, P. 7, internal citations omitted). The court below concluded that, "[t]he places to be searched were described with sufficient particularity, and the warrants were not so facially deficient in that regard that Wright could not reasonably presume them to be valid." (App. A, P. 9).

Similarly, regarding Signature's claim that the warrants' description of the items to be seized too broad, the court below disagreed, noting that, "[a] warrant's description need not contain elaborate specificity; it is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized." (App. A, Pp. 10-11). Accordingly, utilizing the standard for review of a qualified immunity issue, the court below held that Officer Wright "[d]id not violate plaintiffs' Fourth Amendment right, and he is entitled to qualified immunity for the unlawful seizure claim." (App. A, P. 11).

Lastly, the court below also reversed on the remaining issue regarding Signature's claims of unlawful conspiracy. (App. A, P. 11). The claim of unlawful conspiracy has not, however, been raised to this Court as part of the Petition for Writ of Certiorari, and,

accordingly, the determination of the Eleventh Circuit concerning unlawful conspiracy is not at issue for further judicial review.

After the opinion of the Eleventh Circuit had been filed, Signature Pharmacy sought a "Petition for Panel Rehearing or Rehearing *En Banc*" from the Eleventh Circuit. Both the petition for rehearing and rehearing *en banc* were denied by the Eleventh Circuit Court of Appeals. (App. C).

REASONS FOR DENYING THE PETITION

The opinion of the Eleventh Circuit Court of Appeals appropriately held in favor of a law enforcement officer on the issue of qualified immunity. Because the legal determinations held by the Eleventh Circuit rested upon settled law regarding the issuance of qualified immunity, including this Court's guidance from *Malley v. Briggs*, 475 U.S. 335 (1986) through *Pearson v. Callahan*, 555 U.S. 223 (2009), there is no holding reached that requires further review. The efforts of the Petitioners to expansively interpret the analysis of the court below to otherwise cast the issue as one with a conflict between circuits, when no such conflict exists, should result in this Court declining the request for an unnecessary further review. Moreover, even if those recast issues were at issue here, the analysis of the Eleventh Circuit is correct and requires no additional clarification regarding the already established precedent.

I. THE ISSUE BEFORE THE ELEVENTH CIRCUIT COURT OF APPEALS WAS ONE OF QUALIFIED IMMUNITY, AND THE LEGAL HOLDINGS REGARDING QUALIFIED IMMUNITY WERE RESOLVED CONSISTENT WITH THIS COURT'S ANALYSIS IN *MALLEY v. BRIGGS* AND *PEARSON v. CALLAHAN* AND REQUIRE NO FURTHER REVIEW.

In an effort to create a reviewable issue, the determination by the court below, made on grounds concerning the qualified immunity privilege, has been converted by the Petitioners to a review of warrants divorced from that important procedural setting. In fact, a review of the argument headings, including subargument headings, provided by Petitioners illustrates that not one of those arguments contain a reference to the actual issue that was before the court below: whether qualified immunity was appropriate. (Pet., Pp. 10, 17, 24). Accordingly, any analysis of the correctness of the legal determinations of the court below must be reviewed from the perspective of whether the determination regarding qualified immunity was appropriate.

Instead, the Petition focuses singularly upon the subissues regarding whether the particularity of details within the warrants were sufficient. As noted by this Court, however, when the issue is one of qualified immunity, as opposed to the suppression or admissibility of evidence, the qualified immunity review involves a wholly different review than would be appropriate for an evidentiary issue. *See, e.g., Saucier*

v. Katz, 553 U.S. 194, 205-206 (2001), modified on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009) ("the qualified immunity inquiry, on the other hand, has a further dimension.") By truncating the applicable analysis to only the concerns regarding particularity, Petitioners avoid this "further dimension" by which any issue of qualified immunity must be analyzed.

Regarding that further dimension, this Court has consistently held that "qualified immunity protects all but the plainly incompetent officer, or an officer who knowingly violates the law, in obtaining a search or arrest warrant." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Eleventh Circuit correctly encapsulated the *Malley* standard when it held, both previously and in the instant case, "a government agent is entitled to immunity unless his act is 'so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing.'" (App. A, P. 5). *Rehberg v. Paulk*, 611 F.3d 828, 838 (11th Cir. 2010) (quoting *Lassiter v. Ala. A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994)).

Accordingly, for the Petitioners' ensuing argument to have merit, it is insufficient that their allegations regarding the particularly of the warrants be true. As determined by the Eleventh Circuit Court of Appeals, those arguments are not correct; even if they were, however, the Petitioners would still have to establish that Officer Wright was "plainly incompetent" or "knowingly violated the law." *Malley*, 475

U.S. at 341. Petitioners' argument was specifically found to be incorrect by no less than three appellate judges. (App. A, Pp. 2, 12). To hold a law enforcement officer to a greater understanding of the applicable legal standards than an unanimous appellate panel would be untenable. This Court has made clear that such a standard is not the law of qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("if judges disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

This Court has more recently clarified that "protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions or law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing to Justice Kennedy's dissenting opinion in *Groh v. Ramirez*, 540 U.S. 551, 557 (2004)). As made clear by the pronouncements of the Supreme Court in *Callahan*, qualified immunity only becomes an issue after some alleged error has occurred. Here, the error alleged would be the legal interpretation of the wording as utilized by Officer Wright being too expansive to maintain the validity of the warrant. This would be exactly the type of mistake of law, if true, for which an officer would still be eligible for proper application of qualified immunity.

As noted in *United States v. Leon*, 468 U.S. 897 (1984):

> Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination.

Leon, 468 U.S. at 914.

As noted earlier, probable cause is no longer an issue, as the district court has ruled in Officer Wright's favor on the issue of qualified immunity as it relates to probable cause. (App. B, P. 45). Regardless, *Leon*'s requirement remains consistent such that the qualified immunity will be afforded to the officer unless it can be shown that no reasonable officer would have believed the affidavits to have been valid. *Anderson v. Creighton*, 483 U.S. 335, 344 (1987) (officer entitled to qualified immunity if "a reasonable officer could have believed" that the search was lawful). Here, given the fact that the affidavits and applications contained a description of numerous specific items and specifically described the location, combined with the length of time with which each of these applications were reviewed by an independent circuit court judge, yields the necessary conclusion that other reasonable officers would not have perceived the invalidity as alleged below, and, accordingly, any "mistake of law" now alleged would be plainly subject to the qualified immunity privilege.

Pearson, supra. There being no error, no conflict, and no argument directly addressing the issue of qualified immunity, this Court should decline the request for further review and deny the Petition accordingly.

II. THERE IS NO SPLIT IN AUTHORITY REGARDING QUALIFIED IMMUNITY WARRANTING THIS COURT'S INTERVENTION.

The Eleventh Circuit's fact-specific opinion was consistent with the guiding authority from this Court and its sister courts. Reviewing the test of the unpublished opinions certainly reveals no "direct" conflict as alleged, nor would one be reasonably implied by a review of these decisions. Accordingly, there is no genuine conflict that would require this Court's further review of the decision below.

A. There Is No Conflict With Supreme Court Precedent.

The Petitioners urge that a "direct conflict" exists between the decision of the Eleventh Circuit, below, and this Court's decision in *Groh v. Ramirez*, 540 U.S. 551 (2004). (Pet. 24-27). In actuality, however, not only does no "direct" conflict exist, but the opinion of the Eleventh Circuit both harmonizes with and cites to this Court's decision in *Groh* as part of its analysis. (App. A, Pp. 6-7).

Notably, quite apart from "directly conflicting" with *Groh*, the lower court quoted directly from it,

noting that, "[g]iven that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that warrant was valid." *Groh*, 540 U.S. at 563. (App. A, P. 6). The Eleventh Circuit continued, however, that the analysis of the particularity requirement did not end there, but instead on whether the specific warrants that Officer Wright executed conflicted with this particularity requirement and further whether "a reasonable officer could rely upon the warrants and that he was not plainly incompetent or knowingly violating the law in doing so," citing to *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The lower court then correctly concluded that, "[b]ecause the warrants contained detailed descriptions of the items to be seized and were signed by a state court judge after careful examination, we conclude that Wright's reliance on the warrants in executing his search of the premises was reasonable." (App. A, P. 7).

Accordingly, the Eleventh Circuit properly applied the law as set forth by this Court in *Groh*. In addition, when viewing *Groh* in light of the factual disparities between that case and the instant case, it is readily apparent that *Groh* is consistent with, as opposed to conflicting with, the Eleventh Circuit Court opinion. In *Groh*, an agent conducted a search of an individual's residential ranch. *Groh*, 540 U.S. at 553, 554. The application for that warrant, provided to a magistrate, "failed to identify *any* of the items that petitioner intended to seize." *Id.* at 554. The

warrant instead simply described the item to be seized as the ranch owner's two story blue house, rather than the firearms or other objects that were described in the affidavit. *Id.* The Court found that the failure of the warrant to contain any identification of the "persons or things to be seized" meant that the warrant was facially invalid. *Id.* at 557-558. The Court continued that, "[i]n other words, the warrant did not describe the items to be seized *at all*. In this respect the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." *Id*. at 558 (emphasis in the original).

The warrant prepared by Officer Wright and executed by Judge Kest in the instant case, however, is patently dissimilar to the warrant at issue in *Groh*. First, it must be noted that this Court in *Groh* took care to explain that the ranch that was the subject of the raid was the respondent's home and residence. *Id.* at 554-555. To that point, this Court specified that the supporting case law referenced, holding that the search must be viewed as "'warrantless' within the meaning of our case law," cited to these principle decisions holding the protections of a residence paramount:

> Because "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'" stands "'[at] the very core' of the Fourth Amendment," *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)

> (quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)), our cases have firmly established the "'basic principle of Fourth Amendment Law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

Id. at 559. The instant case, however, involved the search of the business offices of Petitioner, Signature Pharmacy, and therefore the heightened standards afforded in cases such as *Kyllo* and *Payton* do not apply. *See, e.g., Minnesota v. Carter*, 525 U.S. 83 (1998) (business owner's expectation of privacy not equivalent to that of a homeowner).

Even if the locations searched were residences and not business offices, however, *Groh* would nonetheless remain inapplicable. The core fact upon which the five member majority of *Groh* reached their conclusion was the fact that there was no description *at all* of the items to be seized (emphasis in the original), and therefore could not let stand immunity for a warrant that asserted the object to be seized as the domicile itself. *Id.* In the instant case, however, the description of the business offices was placed properly where the warrant described the premises to be searched, and a list of those items to be seized was provided, at length, in the particular section of the warrant where that description was appropriate. As such, the warrant at issue here is precisely the type of warrant that the majority in *Groh*

offered was not at issue, instead focusing only on those warrants that failed to provide any list of items to be seized *at all*. *Id.* (emphasis in the original).

Accordingly, proper analysis of *Groh* makes clear that the warrant in the instant case is the type of warrant that a reasonable officer would rely upon. *Id.* Even if the court below determined that the warrant was defective for a lack of better specificity, such a mistake of law is clearly not to be utilized as a reason to remove the shield of qualified immunity that law enforcement officers are entitled to under these circumstances. *See generally Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Accordingly, *Groh v. Ramirez* is not at all in "direct conflict" to the opinion rendered by the Eleventh Circuit Court of Appeals. Instead, the lower court's opinion is consistent with *Groh*, *Pearson v. Callahan,* and *Malley v. Briggs*, and thus the request for further review should be denied.

B. There Is No Conflict With Other Circuit Courts Of Appeals Regarding Qualified Immunity Issues.

Separate from urging a "direct conflict" with this Court's decision in *Groh v. Ramirez*, Petitioners also assert conflict with the Eleventh Circuit's sister courts. This argument is undermined by the fact that the opinion itself contains no express or direct conflict with the decision of any other court, be that court

district, circuit, or supreme. (App. A). To the contrary, the lower court notes no disagreement with any other judicial opinion, nor was such a disagreement implicit in any holding reached by the lower court concerning any citation of authority. The reason for such a lack of conflict is both because the Eleventh Circuit's opinion is grounded in ample citation to the prevailing authority and because no holding reached by the lower court is based upon issues of law for which other circuits are presently in conflict. There being no conflict between circuits on the issue regarding proper interpretation of the qualified immunity privilege, there is no reason for this Court to undertake the further review requested by the Petitioners.

1. No Conflict Exists Amongst Circuit Courts Regarding The Particularity Clause With Regard To Location Of The Premises To Be Searched.

Petitioners strain to find conflict by urging that the Eleventh Circuit opinion conflicts with the opinions of two circuit courts, the Sixth and the Seventh, with regard to the portion of its analysis regarding the particularity clause. (Pet., Pp. 10-13, citing to *United States v. Higgins*, 428 F.2d 232 (7th Cir. 1970) and *United States v. Votteller*, 544 F.2d 1355 (6th Cir. 1976)). Both citations, however, are patently distinguishable on multiple important factors and neither case holds either direct or express conflict with either the opinion of the court below or of the precedential cases that the court below relied upon. Accordingly,

this Court should decline to review further, based upon an alleged conflict which does not exist.

First, with regard to the citation to the decision of the Seventh Circuit in *United States v. Higgins*, decided over forty years ago, *Higgins* involved a fundamentally different procedural setting. Consistent with the majority of cases cited by the Petitioners, *Higgins* is not a matter involving qualified immunity, but, instead, is set upon the procedural foundation of a motion to suppress evidence resulting from a search. Specifically, *Higgins* involved a situation where a search warrant was issued with regard to a residential apartment building. *Higgins*, 428 F.2d at 234. Even though the search warrant specified three apartments in the basement of the building, the warrant nonetheless commanded the search only of "the premises known as the basement apartment," thereby providing no indication as to which of the three residential apartments should be searched. *Id*. The *Higgins* court further described the fact that the officers entered a wrong apartment first, to support its determination that the warrant failed to describe with particularity the place to be searched. *Id*. at 234-235.

The instant case, however, does not involve a residential apartment building, but instead a commercial building maintained by Signature, the entity subject to the search warrant. (App A, Pp. 3-4). Accordingly, as a threshold matter, it must be noted that a search of a business office is not afforded the heightened standards applicable to "the right of a

man to retreat into his own home and there be free from unreasonable government intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505 (1961)). *See, e.g., Minnesota v. Carter*, 525 U.S. 83, 89-90 (1998) (a business owner's expectation of privacy not equivalent to that of a homeowner).

Aside from the important difference between the search of Signature's building and a search of a residential apartment building, it must also be noted that neither the complaint alleged by Signature against Officer Wright nor Signature's response to Officer Wright's motion for summary judgment contained any argument that the now-alleged existence of other entities within Signature's building altered the appropriateness of the search. [C.A. App. Dkt. 3, ¶202]. To the contrary, the pleadings of the Petitioners below, in response to Officer Wright's motion for summary judgment, alleged "[t]here was a reasonable expectation of privacy at Signature's two locations." [C.A. App. Dkt. ¶202, P. 27]. The Petitioners further allege below that, "[t]he individual Plaintiffs all had subjective expectations of privacy in their workplace and Signature had a subjective expectation of privacy in the multi-use buildings it owned and in which it operated its two pharmacy locations." [C.A. App. Dkt. ¶202, P. 2]. Aside from the description of the buildings as "multi-use," there was no effort to disavow ownership of the locations or the identification of the two buildings as belonging to Signature. Accordingly, the business location referenced in the warrant was

described with particularly sufficient detail to allow the searching officer to identify the place intended to be searched (holding a warrant valid when the officer "[w]ith reasonable effort asserted [could] identify the place intended.") *See, e.g., United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986).

As noted by the Eleventh Circuit in the instant case:

> The search warrants at issue contain the addresses of the buildings to be searched and describe the buildings, such as their entryways and doors. For example, the Kuhl Avenue warrant states that the building is two stories, is painted beige with red trim, can be accessed to the East from Columbia Street, has two public entrances, has two sets of double glass doors containing the street address ("1200") and the Signature Pharmacy logo, and has a loading dock on the south side.

(App. A, P. 8). The standard is well established that a warrant's description of the place to be searched is not required to be "technical requirements" but instead simply that the particularity be sufficient to allow "with reasonable effort" a place intended to be identified. *E.g., United States v. Mosby*, 101 F.3d 1278 (8th Cir. 1996). The lower court correctly determined that the identification was, in fact, sufficiently particular. The decision by the Seventh Circuit in *Higgins,* concerning a residential apartment so unidentified that it was searched only after a prior incorrect search had been conducted, is neither a direct

nor even indirect conflict with the decision of the Eleventh Circuit.

Similarly infirm is the effort by the Petitioners to attribute "conflict" status to the decision of the Sixth Circuit in *United States v. Votteller*, 544 F.2d 1355 (6th Cir. 1976). Like *Higgins*, *Votteller* also rests on the procedural setting of a motion to suppress evidence, not a civil matter regarding a question of qualified immunity. *Votteller*, 544 F.2d at 1358. As noted previously in this Response, Issue I, *supra*, the difference is fundamental since the further inquiry regarding qualified privilege "has a further dimension." *Saucier v. Katz*, 553 U.S. 194, 205-206 (2001), modified on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009). It is a fundamentally different inquiry whether or not a criminal conviction can be maintained as a result of evidence from a search than the inquiry as to whether a law enforcement officer may be liable for civil damages under the established precedent that such a privilege is only lost in instances of the officer being "plainly incompetent" or having "knowingly violated the law in obtaining a search or arrest warrant." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). On the basis of the vastly differing standards alone, the assertion of "conflict" regarding *Votteller* or *Higgins* to the instant case is incorrect.

Moreover, like *Higgins*, *Votteller* involves a circumstance where a building included a residence of different individuals, giving rise to the argument that an individual's apartment was improperly searched. *Id.* at 1362-1363. In reaching the determination in

Votteller, the Court specifically referenced the prior decision of the Seventh Circuit in *United States v. Hinton*, 219 F.2d 324, 326 (7th Cir. 1955) ("that a specific 'place' be described *when applied to dwellings* refers to a single *living* unit (the *residence* of one person or family"). *Votteller*, 544 F.2d at 1363 (emphasis added). Accordingly, the effort to ascribe these two cases involving residential apartment buildings on suppression of evidence issues as being in "conflict" with this case, involving the markedly different standards applicable to a qualified immunity question and which involved a detailed description of a business location, is incorrect and is not a proper basis for seeking review by this Court.

Lastly, the assertions of conflict also fail to obviate the correctness of the Eleventh Circuit in further explaining that, even had an issue regarding particularity of location existed, that argument would fail in light of the fact that such a search would not violate the Fourth Amendment rights of the specific Petitioners at issue here. (App. A, P. 9). As correctly noted by the Eleventh Circuit, this Court has determined that the Fourth Amendment protects the rights of people, not places, and further noted that a defendant must demonstrate a personal expectation of privacy in the place searched to claim the protection of the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967); *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). For those additional reasons, the conclusion of the lower courts that the warrants "were not so facially deficient in that regard that Wright could

not reasonably presume them to be valid" is a determination that does not conflict with the decisions of its sister courts and therefore does not require further review.

2. There Is No Clear Conflict Between The Opinion Of The Eleventh Circuit And Its Sister Circuits Regarding The Particularity Of The Items Subject To Seizure.

Petitioners contort the opinion of the Eleventh Circuit to create a conflict with the law as followed by other circuits when such a conflict does not exist. A review of the decision by the lower court reveals no such conflict, and in fact a review of the precedent from other circuits reveals these two truths: (1) no identifiable conflict exists between the circuits regarding application of qualified immunity privilege principles; and, (2) the fact-intensive determinations with regard to particularity clause determinations reveal no clear conflict requiring review by this Court.

It is not a difficult task to review the decisions of the circuit courts over time and cull from them cases which either did or did not determine evidence obtained to be inadmissible as a result of the language of the related search warrant. *See, e.g., United States v. Leary*, 846 F.2d 592 (10th Cir. 1988); *United States v. Roche*, 614 F.2d 6 (1st Cir. 1980); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States v. Lazar*, 604 F.3d 230 (6th Cir. 2010) (cases cited by

Petitioners here where evidence from searches was deemed inadmissible); *cf., United States v. Upham*, 168 F.3d 532 (1st Cir. 1999); *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), *cert. den.,* 523 U.S. 1101 (1998); *United States v. Dennis*, 625 F.2d 782, 792-03 (8th Cir. 1980); *United States v. Timpani*, 665 F.2d 1, at 4-5 (1st Cir. 1981) (cases upholding the use of evidence obtained despite broad language of associated search warrants). *See also United States v. Emmons*, 24 F.3d 1210 (10th Cir. 1994) (explaining that when requesting a search of a drug dealing business, it is difficult to list the items to be seized with particularity). Such an exercise reveals only that this type of determination is innately fact intensive and does not provide an innate "conflict" between circuits, particularly on the issue reached by these cases concerning the issue here: qualified immunity.

In the instant case, a review of the affidavit shows a list of specific items in four categories: inventories and shipping records regarding drugs; banking records; scheduling calendar information; and, electronically stored information. The description was thoroughly reviewed by a sitting circuit court judge prior to the warrants' approval and execution. (App. A, P. 4). As a result, the lower court properly determined these items would serve as evidence of criminal violation of the laws of the State of Florida, including, for example, "bad faith manufacture, purchase, sale, or delivery of anabolic steroids by prescription. . . ." (App. A, P. 10). There is no conflict expressed by the Eleventh Circuit, nor is there one

otherwise to be gleaned from the authorities cited by the court below. Accordingly, no conflict exists that would require further review by this Court.

III. THE UNPUBLISHED DECISION BELOW LACKS EXCEPTIONAL IMPORTANCE.

Petitioners urge that the decision by the Eleventh Circuit Court of Appeals is a perfect "vehicle" for purposes of this Court's review. It is not. As detailed in the previous argument, there is no foundation for such a review, as the framework lacks either actual conflict with a decision of this Court or any issue of law regarding qualified immunity that serves as an unresolved debate between circuits. (Issues I, II, *supra*). Moreover, the Petitioners' assertions to the contrary, the decision appealed has not been held or interpreted to be either ground breaking or jurisprudentially important by any source, including the Eleventh Circuit Court of Appeals itself. The decision rendered has been left "unpublished," appearing only in the Federal Appendix and not in either the Fed. 3d Reporter or even the Federal Supplementary "F. Supp." Reporter. *Signature Pharm., Inc. v. Wright*, 438 F. App'x 741 (11th Cir. 2011).

It is noteworthy to the issue of whether this is an "appropriate vehicle" for review that not a single legal journal, article, or essay has been written about the unpublished opinion, nor has any effort been made to attach importance to this decision, outside of the present parties to this appeal. Similarly, while

Federal Rules of Appellate Procedure 32.1, governing the citation to unpublished opinions, permits citation to unpublished opinions, such as this one, no opinion of any court has referenced this decision since it was issued and available on electronic reporters, from July 19, 2011. *Id.* at 741.

To be clear, Respondent does not dispute the importance of the general subject matter of the Fourth Amendment to the Constitution. Nor does Respondent dispute the great importance of the opinion at issue to the parties to this appeal. Nonetheless, there is simply no fuel available to generate any genuine controversy requiring the review of this Court for an unpublished, uncontroverted, and uncited-to opinion from the court below. Accordingly, for this additional reason, this Court should decline the request, however fervently made, and deny the Petition seeking this Court's review.

CONCLUSION

For each of the foregoing reasons, Officer Alex Wright requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

NICHOLAS A. SHANNIN, ESQUIRE
Florida Bar No. 0009570
PAGE, EICHENBLATT, BERNBAUM & BENNETT, P.A.
214 East Lucerne Circle
Orlando, Florida 32801
407-386-1900
407-209-1006 (fax)
nshannin@floridalawonline.com
Counsel for Respondent Alex Wright